IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, on behalf of themselves and all others similarly situated *Plaintiffs*, v. DONALD J. TRUMP, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-2718-RDM [Consolidated with Civil Action No. 18-cv-2838-RDM]

PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND CLASS CERTIFICATION

Pursuant to Federal Rules of Civil Procedure 23 and 56, and Civil Local Rules 7 and 23.1(b), Plaintiffs hereby move the Court to certify their proposed class and issue summary judgment in their favor. In support of this motion, Plaintiffs rely upon the attached Memorandum of Points and Authorities, Statement of Material Facts not in Genuine Dispute, and accompanying declarations. A proposed order is attached.

Dated: January 4, 2019

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CLASS CERTIFICATION

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INTRODUCTION

The Government hastily promulgated a rule that it concedes will prevent thousands of refugees with valid asylum claims under the Immigration & Nationality Act from ever obtaining asylum. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55,936 (Nov. 9, 2018) ("the Rule"). The Rule places a categorical bar on asylum eligibility on those individuals who enter the United States outside of a designated port of entry—even though the INA expressly provides that "any alien" is entitled to apply for asylum "whether or not [the individual arrived] at a designated port of arrival" and irrespective of "such alien's status." 8 U.S.C. § 1158(a)(1). The Rule violates the INA and is therefore unlawful.

The Government does not have any serious response on the merits. At most, the Government contends that the Rule does not impact an alien's right to apply for asylum. The alien can apply, the Government protests, it is simply that the Government will render the application meaningless by categorically rejecting it. For obvious reasons, courts considering the very same issue in the *East Bay* litigation have now repeatedly rejected such a "hollow right." The Government therefore primarily pivots instead to arguing that the INA's jurisdictional provisions prohibit the Court from hearing Plaintiffs' claims that the Government has violated the INA. That argument is also baseless.

Nothing in the INA permits the Government lawlessly to upend the statute's substantive rights without meaningful judicial review at this crucial juncture. To the contrary, the INA permits the Court to hear the case because Plaintiffs do not seek review of an order of removal; rather, this is a challenge to a change in asylum eligibility. But even if the Government were correct that the INA would otherwise bar the Court from hearing the case, the Government recently conceded that Plaintiffs like A.V. who are currently in expedited removal proceedings are subject to 8 U.S.C. § 1252(e)(3), which explicitly vests jurisdiction in this Court. And Plaintiff G.Z., an

unaccompanied immigrant child, is entitled to have his asylum claim adjudicated *outside* of removal proceedings pursuant to 8 U.S.C. § 1158(b)(3)(C), which illustrates why the Government's reliance on the INA's jurisdiction-channeling provisions is inapt.

The unlawful Rule affects not only the named Plaintiffs, but also the thousands of asylum-seekers who have or will have entered the United States through the southern border, without inspection, after November 9, 2018. Because such similarly situated individuals are numerous and because they are affected equally by the Rule, Plaintiffs respectively request that the Court certify Plaintiffs' proposed class when addressing their motion for summary judgment.

BACKGROUND

Six Plaintiffs filed this lawsuit on November 20, 2018, asserting eight causes of action. Dkt. 1. They filed a motion for a temporary restraining order and a preliminary injunction on November 21. Dkt. 6. The parties submitted full briefing on the motion and the Court held a hearing on December 17 on both that motion and the TRO/preliminary injunction motion in the consolidated case *S.M.S.R. v. Trump*, No. 18-cv-02838 (D.D.C. 2018). At the hearing, the Court suggested that temporary injunctive relief in these cases may be unnecessary as long as a nationwide temporary restraining order and/or preliminary injunction against enforcement of the Rule remained in place in the related case *East Bay Sanctuary Covenant v. Trump*, 2018 WL 6053140 (N.D. Cal. Nov. 19, 2018). *See* Ex. L-1 (Transcript of Hr'g on Mot. For TRO), at 123:17-125:10. The Court directed the parties to confer and submit their views on expedited declaratory judgment summary judgment briefing pursuant to Federal Rules of Civil Procedure 56 and 57. Dec. 17, 2018 Minute Order.

On December 18, Plaintiffs filed an Amended Complaint adding three Plaintiffs and adding class allegations as to Counts 1 and 3-8. Dkt. 40. On December 19, the *East Bay* court replaced

the TRO with a preliminary injunction that continued to bar enforcement of the Rule on a nationwide basis. *See E. Bay Sanctuary Covenant v. Trump*, 2018 WL 660080 (N.D. Cal. Dec. 19, 2018). While the Government has appealed that order to the Ninth Circuit, its efforts to obtain an emergency stay of the *East Bay* court's order appear to have ended after the Supreme Court denied an emergency stay request on December 21. *See Trump v. E. Bay Sanctuary Covenant*, 2018 WL 6713079 (U.S. Dec. 21, 2018).

At in-person and telephonic hearings on December 21, this Court set an expedited schedule for the parties to file consolidated briefing on Plaintiffs' summary judgment and class certification motions, and any cross-motion for summary judgment by the Government.

ARGUMENT

The Court invited the parties to avoid repetition by incorporating by reference portions of the earlier briefing on the TRO/preliminary injunction motions, which Plaintiffs do in this brief. Plaintiffs accordingly incorporate by reference the prior briefing and argument concerning the merits of their claims. *See* Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction ("TRO Mot.") at pages 2-18, Dkt. 6; Reply in Sup. of Mot. for TRO and Prelim. Inj., Dkt. 23; Tr. of Mot. Hr'g. (Dec. 17, 2018), Dkt. 41. Plaintiffs further incorporate by reference the prior briefing and argument in the consolidated case *S.M.S.R. v. Trump*, 18-cv-2838-RDM. Mot. for TRO and Prelim. Inj., Dkt. 6; Reply in Sup. of Mot. for TRO and Prelim. Inj., Dkt. 34.

Having incorporated their prior briefing and argument by reference, Plaintiffs below address issues specific to their motion for summary judgment and class certification. Plaintiffs also address new arguments raised by the Government subsequent to the December 17, 2018 hearing.

I. Plaintiffs Are Entitled to Judgment Under Rules 56 and 57.

Rule 56 permits a court to enter judgment as a matter of law when there is "no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Where, as here, a party challenges the legality of an agency action, the question presented to the Court "is a legal one which the district court can resolve on the agency record, regardless of whether it is presented in the context of a motion for judgment on the pleadings or in a motion for summary judgment." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (citing *Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999)). Similarly, Rule 57 provides that "[t]he court may order a speedy hearing of a declaratory-judgment action," especially where the claim for declaratory relief "involves only an issue of law on undisputed or relatively undisputed facts," *id.* at advisory comm. notes; *see also United Christian Scientists v. Christian Sci. Bd. of Dirs.*, 829 F.2d 1152, 1157-59 (D.C. Cir. 1987) (recognizing the appropriateness of granting declaratory relief through the mechanism of summary judgment proceedings). Declaratory relief is appropriate in this case because a substantial controversy exists between Plaintiffs and Defendants as to the legality of the Rule, and Plaintiffs will be irreparably harmed in the absence of an order from this Court enjoining application of the Rule. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).[1]

II. The Rule Is Unlawful.

A. The Rule Eviscerates the Substantive Right To Seek Asylum.

The Rule violates 8 U.S.C. § 1158(a)(1) because it mandates the automatic denial of asylum to certain refugees based on their manner of entry into the United States, unequivocally

[1] Plaintiffs do not move for summary judgment at this time as to Count 5 of the Complaint, regarding the lawfulness of the appointment of Matthew Whitaker as Acting Attorney General.

denying such individuals the right to seek asylum in direct contravention of statutory language. (Count 1). The only other courts to have addressed the legality of the Rule have easily—and repeatedly—reached this same conclusion. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1231 (9th Cir. 2018); *E. Bay*, 2018 WL 660080; *E. Bay Sanctuary Covenant v. Trump*, 2018 WL 6053140, at *1 (N.D. Cal. Nov. 19, 2018). As the Ninth Circuit held, "[i]t is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact." 909 F.3d at 1247.

Beyond that, the Rule is unlawful in ways including the following. It: (i) improperly establishes a framework by which the President may dictate unilaterally the content of future limitations and conditions on asylum in contravention of 8 U.S.C. § 1158(b)(2)(C) (Count 6); (ii) violates the expedited removal statute, 8 U.S.C. § 1225(b) (Count 2); (iii) violates the TVPRA's requirement that unaccompanied children be permitted to present their application for asylum to an asylum officer (Count 3); (v) is arbitrary and capricious (Count 4); (vi) was promulgated without an opportunity for notice and comment pursuant to 5 U.S.C. §§ 553(a)-(d) (Count 7); and (vii) amounts to *ultra vires* rulemaking (Count 8).

In support of the factual background Plaintiffs supplied in their prior briefing, and in connection with Count 7 (regarding the lack of good cause to forgo notice and comment), Plaintiffs highlight that the Government's Administrative Record provides additional support for Plaintiffs' position and refutes the Government's contention that a new crisis necessitated the swift implementation of the Rule.[2]

[2] The Government has not yet filed the Administrative Record in this case, but previously filed it in the *East Bay* case. *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-06810-JST (N.D. Cal.

First, the Administrative Record includes documentation of the reasons migrants are forced to leave their home countries and the dangers they face in trying to reach the United States via Mexico. *See, e.g.*, AR 153-84. This evidence supports Plaintiffs' position of the danger facing refugees who wait to enter the United States through a port of entry along the southern border. *See* TRO Mot., Dkt. 6 at 11-13, 42. For example, the Administrative Record includes a report from Doctors Without Borders discussing the risks to refugees forced to wait on the Mexico side of the border, including becoming "victims of violence and crime." AR 173.[3] Indeed, the report notes that "[a] stunning 68.3 percent of migrants and refugees surveyed by [Doctors Without Borders] reported having been victims of violence on the transit route to the United States." AR 178. Although the Rule purports to channel migrants to ports of entry, the Administrative Record highlights why this is not a safe option for refugees—faced with violence and crime in Mexico, they must cross as expeditiously as possible to reach the safety of the United States.

Second, the Administrative Record includes Government statistics that the Plaintiffs previously cited and that refute the Government's assertion that a new crisis precipitated the Rule. The Administrative Record includes the same CBP data Plaintiffs cited establishing that the total number of people apprehended by border officials after crossing irregularly was at a 46-year low

Dec. 1, 2018). The Government has stated that the record will be filed in this case with identical pagination as was assigned in the *East Bay* case, so Plaintiffs are citing to those page numbers.

[3] Medecins Sans Frontieres, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* (Updated June 14, 2017). AR 153.

in 2017, and that in 2017 there were 100,000 fewer apprehensions of undocumented noncitizens than in 2016. AR 301.[4]

Third, the Administrative Record shows that while apprehensions have dropped, the number of people receiving asylum has increased. *See* AR 326.[5] Data from the Executive Office for Immigration Review (EOIR) demonstrates that the number of people who received asylum has steadily risen over the past five years, from 9,753 in 2013 to 10,654 in 2017. AR 329. And, as noted in the Amended Complaint, Dkt. 40, ¶ 76, according to the Government's own statistics, which were included in the Administrative Record, the "Northern Triangle" nations of El Salvador, Honduras, and Guatemala were three of the four most common countries of nationality of persons granted asylum in 2016 and 2017. AR 331. In total, in 2017, EOIR data shows that 3,261 people from these three countries were granted asylum. *Id.* In the Rule's statement of purpose, the Government itself acknowledges that in 2018 "about 6,000 aliens" proceeded through the expedited removal process, from a credible fear interview to a full adjudication of their application for asylum, and successfully "established that they should be granted asylum." AR 002. Under the new Rule, these thousands of refugees who successfully established their eligibility for asylum would have instead been denied the opportunity to even apply had they crossed the southern border outside a port of entry. Under the Rule, these *bona fide* refugees face the risk of removal to countries where they face persecution.

In short, the Administrative Record supports Plaintiffs' position in this case and does not supply good cause for the Rule or otherwise support the Government's defense of the Rule.

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[4] U.S. Border Patrol, U.S. Customs & Border Protection, *Southwest Border Sectors: Total Illegal Alien Apprehensions By Fiscal Year (Oct. 1st through Sept. 30th)* (Dec. 2017), cited in TRO Mot., Dkt. 6, at 15 & n.22.

[5] Executive Office for Immigration Review, Statistics Yearbook, Fiscal Year 2017.

B. The Rule Also Violates Important Procedural Rights.

1. The Rule Violates Plaintiff G.Z.'s Rights Under the TVPRA.

As set forth in Plaintiffs' opening briefing, Plaintiff G.Z. is also entitled to summary judgment on the additional claim that the Rule violates the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Pub. L. 110-457. Compl. at 27; TRO Mot. at 23; TRO Reply at 10-11. In particular, the Rule violates 8 U.S.C. § 1158(b)(3)(C). That provision provides that an asylum officer shall have "initial jurisdiction over any asylum application filed by an unaccompanied alien child." *Id.* While the Government maintains that unaccompanied minors would still appear before an Asylum Officer under the Rule, the Rule would bar G.Z. from receiving asylum. Thus the interview the government describes would be meaningless. *See* Gov't Resp. to TRO Mot. at 27.

This approach to such an interview is inconsistent with the purpose of the TVPRA and the requirement that unaccompanied minors be given an opportunity to seek protection in a non-adversarial setting. Congress saw the TVPRA as an "'important step to protecting unaccompanied alien children, the most vulnerable immigrants,' and to fulfilling our nation's 'special obligation to ensure that these children are treated humanely and fairly.'" *Flores v. Sessions*, 862 F.3d 863, 880–81 (9th Cir. 2017) (quoting 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008)); *see also Harmon v. Holder*, 758 F.3d 728, 733-34 (6th Cir. 2014) (the non-adversarial interview mechanism protects unaccompanied children). Congress included asylum provisions in the TVPRA to protect children who had "been forced to struggle through an immigration system designed for adults." 154 Cong. Rec. S10886–01 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein, cosponsor of original Senate version). And courts have recognized the importance of the procedural protections that the TVPRA provides to children. *See, e.g., D.B. v. Cardall*, 826

F.3d 721, 738 (4th Cir. 2016) (finding that TVPRA reflects "Congress's unmistakable desire to protect [the] vulnerable group" of unaccompanied minors).

A *pro-forma* asylum interview limited to ascertaining whether an unaccompanied minor entered the United States without inspection—as the Government apparently intends under the Rule—would violate 8 U.S.C. § 1158(b)(3)(C) because it would deprive the asylum officer of jurisdiction to provide the required non-adversarial proceeding in which the child may seek protection.

The Court also would have jurisdiction over G.Z.'s claim under the TVPRA even apart from the other jurisdictional issues the Government has raised. Minors like G.Z. (and any asylum seeker who decides to affirmatively apply for asylum) have the right to have those claims adjudicated outside of the context of removal proceedings, by the Asylum Office, so Section 1252(b)(9) cannot bar these claims.[6]

2. The Rule is an Illegal Change to the Expedited Removal Process.

The Rule also implements an illegal change in the expedited removal process by eliminating important procedural protections for asylum seekers who cross the southern border outside ports of entry.[7] As Plaintiffs have explained previously, by eviscerating statutory

[6] Moreover, requiring minors to wait to raise a TVPRA claim until their immigration cases have been litigated through the Board of Immigration Appeals to the Court of Appeals may prevent them from receiving relief—minors may well reach adulthood before courts resolve their claims.

[7] Plaintiffs pursue the 8 U.S.C. § 1225 claim on an individual basis, not a class basis, because of the bar set forth in Section 1252(e)(1)(B). However, the appropriate remedy as to Plaintiffs' individual claims is a nationwide injunction. The Government has disputed the Court's ability to enter such an injunction absent a class action, Dkt. 22, 44-45, without acknowledging longstanding circuit precedent holding the contrary. *See Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 533-35 (D.C. Cir. 1963). At any rate, those arguments particularly are ill-taken in the context of expedited removal and the jurisdictional provision that explicitly permits system-wide challenges while barring class actions. *Compare* 8 U.S.C. § 1252(e)(3) *with* § 1252(e)(1)(B).

safeguards that Congress recognized were necessary to comply with international law and overriding existing implementing regulations, the Rule violates 8 U.S.C. § 1225(b) and its implementing regulations. TRO Mot., Dkt. 6, 21-22; Reply in Sup. of Mot. for TRO and Prelim. Inj., Dkt. 23, 9-10. New authority in this District further supports Plaintiffs' 8 U.S.C. § 1225(b) claim.

On December 19, 2018, Judge Sullivan decided *Grace v. Whitaker*, No. 18-CV-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018), in which a group of asylum-seekers challenged recent changes to the standard and procedure for making "credible fear" findings in the expedited removal context. Under 8 U.S.C. § 1225(b)(1)(B)(i), refugees must receive a credible fear interview with an Asylum Officer. Judge Sullivan held that a categorical rule mandating a negative credible fear determination for refugees fleeing domestic violence or gang violence "runs contrary to the individualized analysis required by the INA." *Grace*, 2018 WL 6628081 at *20. He further explained "[c]redible fear determinations, like requests for asylum in general, must be resolved based on the particular facts and circumstances of each case." *Id.*

Like the categorical rule in *Grace*, the Rule at issue here categorically prohibits refugees from passing credible fear interviews based on a single criterion—manner of entry—which similarly "runs contrary to the individualized analysis" Congress required Asylum Officers to conduct.

III. Plaintiffs' Claims Are Justiciable.

The parties have also previously briefed the jurisdictional issues at length and argued them to the Court during the oral argument on December 17, 2018. Plaintiffs provide this short additional discussion to (1) to address additional jurisdictional arguments the Government made in a December 18, 2018 Notice of Filing that accompanied the Notices to Appear, *see* Dkt. 36; and

(2) to apprise the Court of several additional relevant principles outlined in *Grace v. Whitaker*, which was recently decided in this District.

A. The Government's December 18 Notice of Filing.

As Plaintiffs explained in prior pleadings and during oral argument, the jurisdictional limitations in 8 U.S.C. § 1252 do not apply here because the Rule at issue makes a systemic change to asylum eligibility that applies to all refugees seeking asylum, whether as an affirmative claim, in ordinary removal proceedings, or in expedited removal. *See, e.g.*, Dkt. 23 at 2-3. Jurisdiction is thus appropriate under 28 U.S.C. § 1331. The Government's supplemental Notice of Filing, Dkt. 36 (Dec. 18, 2018), does not demonstrate an absence of jurisdiction.

Even if the jurisdictional limitations in § 1252 did somehow apply, the Government's December 18 filing essentially concedes jurisdiction. On the Government's own theory, Plaintiff A.V. is in expedited removal proceedings, *see* Plaintiffs' Statement of Material Facts ("SMF") ¶¶ 14-15, and so "is subject to 8 U.S.C. § 1252(e)(3)," Dkt. 36 at 1. If that is right, Section 1252(e)(3) specifically vests jurisdiction in this Court to hear A.V.'s claims. While the Government contends that "Congress did not intend" § 1252(e)(3) to allow for "review outside of the very limited expedited removal review procedures," Dkt. 136 at 1, the Government cites no authority to that effect. Further, it cannot be true that challenges under § 1252(e)(3) may only be brought at the conclusion of removal proceedings, if that is the Government's argument. If that were correct, timely challenges to new regulations would be impossible because § 1252(e)(3)(B) requires that such challenges be brought within 60 days of a new regulation taking effect. The Government could always prevent challenges by stalling a potential plaintiff's expedited removal proceedings

until after the deadline has run.[8] That cannot have been Congress's intent. Plaintiff A.V. is thus appropriately before this court under § 1252(e)(3).

The Government also maintains in the December 18 filing that, as to the Plaintiffs not currently in expedited removal proceedings, § 1252(a)(5) and (b)(9) prevent the Court from hearing their claims. Dkt. 36 at 2-3. But neither provision applies. Section 1252(a)(5) applies only to "judicial review of an order of removal," which this case plainly does not involve. Similarly, the sweep of § 1252(b)(9) is far less broad than the Government suggests—only those questions of law and fact "arising from any action taken or proceeding brought to remove" a refugee are included. 8 U.S.C. § 1252(b)(9); *see also Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 504 n.19 (9th Cir. 2018) (Section 1252(b)(9) "appl[ies] only to those claims seeking judicial review of orders of removal." (alteration in original)). In essence, § 1252(b)(9) prevents circumvention of § 1252(a)(5) by channeling review of orders of removal into a single, consolidated appeal from a final removal order. But as Plaintiffs explained in their prior briefing and at oral argument, legal challenges to general restrictions on asylum eligibility do not arise from individual removal proceedings because, among other reasons, asylum is an immigration remedy that can be sought affirmatively before an Asylum Officer, outside of the removal process. Plaintiffs' claims are thus not covered by § 1252(a)(5) or (b)(9). *See* Dkt. 23 at 2-3; *see also* 8 C.F.R. § 208.2 (regulations related to affirmative asylum applications).

[8] It is important to note that there is no other means of obtaining judicial review of expedited removal orders. *See* 8 U.S.C. § 1252(a)(2)(A); 8 U.S.C. § 1252(e). Therefore, if the Government's position were correct, the illegality of the Rule in the expedited removal context would be immune from judicial review altogether: system-wide challenges would be barred by time, and individual challenges would be barred by the jurisdiction-stripping rules of § 1252(e).

B. *Grace v. Whitaker*.

As discussed above, on December 19, 2018, Judge Sullivan decided *Grace v. Whitaker*. In addition to providing additional support for Plaintiffs' 8 U.S.C. § 1225(b) claim, Judge Sullivan's opinion also illustrates the flaws with the Government's jurisdictional arguments. Like here, in *Grace*, the Government asserted that the INA stripped the court of jurisdiction to hear the claims. Judge Sullivan readily held otherwise, focusing first on the plain language of the subsections of § 1252 that deal with expedited removal proceedings, and then turning to several general interpretive principles that apply fully here.

First, Judge Sullivan observed that as a general matter, courts should not restrict access to judicial review absent clear and convincing evidence of a Congressional intent to do so. *Grace*, 2018 WL 6628081 at *12 (citing *Bd. of Governors of the Fed. Reserve Sys. v. MCorp. Fin., Inc.*, 502 U.S. 32, 44 (1991)). Second, Judge Sullivan highlighted that there is a "'strong presumption in favor of judicial review of administrative action.'" *Id.* (quoting *INS v. St. Cyr*, 533 U.S. 289, 298 (2001)). Third, Judge Sullivan looked to the principle of statutory construction that any ambiguities in immigration law "are resolved in favor of the alien." *Id.* (citing *INS v. Cardoza-Fonesca*, 480 U.S. 421, 449 (1987)). Accordingly, Judge Sullivan held that § 1252 did not eliminate the court's jurisdiction to hear the case. *Id.* While Judge Sullivan was interpreting § 1252(a)(2), these interpretive principles apply equally to the remainder of the statute.

Because the plain language of §§ 1252(a)(2), (a)(5), and (b)(9) do not support the Government's jurisdictional argument, the analysis should stop there. But even if the Government's reading of the statute were a plausible interpretation, these principles identified by

Judge Sullivan also counsel in favor of finding jurisdiction in this case.[9] Here, the Government has only a naked assertion—without any supporting citation—that "Congress did not intend" persons like Plaintiffs to access to the courts. That does not suffice for the Government to meet its burden of showing by clear and convincing evidence an intent to restrict jurisdiction. Nor does it overcome the strong presumption in favor of judicial review of administrative action. And, of course, if adopted, it would resolve any ambiguity *against* the alien, not for the alien as required.

In short, nothing supports the Government's extraordinary view that it can issue unlawful rules, in violation of the plain language of the INA and in violation of the process requirements of the APA, and evade any judicial review of those actions. This Court has jurisdiction to hear Plaintiffs' claims that the Government has violated the INA and APA in promulgating the Rule.

IV. The Court Should Certify the Proposed Class.

Plaintiffs O.A., A.V.,[10] K.S., G.Z., C.A., and D.S. propose, along with the putative class representatives in the consolidated case *S.M.S.R. v. Trump*, to bring Counts 1 and 4–8 on behalf of a class defined as:

[9] Because Section 1252 does not apply regardless of whether removal proceedings had been initiated, the Court need not address the Government's argument that a defective Notice to Appear can be cured. *See* Dkt. 36 at 1. However, it is notable that according to the Government's own records, G.Z. was not provided with a time and location for his hearing until December 17, 2018. Thus, removal proceedings had not been properly initiated as to G.Z. when he filed this lawsuit. *See Pereira v. Sessions*, 138 S.Ct. 2105, 2113-14 (2018).

[10] Plaintiff A.V. was not initially included as a proposed class representative because undersigned counsel had been unable to contact her before the Amended Complaint was filed on December 18. She has subsequently agreed to serve as a class representative. *See* Ex. D (A.V. Decl.), ¶¶ 4-6. Plaintiffs are prepared to move to amend the complaint to reflect this change if a formal amendment is deemed necessary.

> All noncitizen asylum-seekers who have entered or will enter the United States through the southern border but outside ports of entry after November 9, 2018.[11]

These claims are ideally suited to class-wide adjudication: the illegal Rule uniformly harms thousands of people, and the universal equitable relief sought will remedy those harms. As such, Plaintiffs' proposed class satisfies all of the requirements of Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The class members are numerous: by the Government's own count, the Rule categorically eliminates asylum eligibility for thousands of people who otherwise would be eligible for asylum. Common legal questions underlie the proposed class's claims, and the named plaintiffs' claims are typical of those of all other persons impacted by the Rule and Proclamation: every named plaintiff and every class member is ineligible for asylum as a result of the Government's new policy. The proposed class representatives and experienced counsel will fairly and adequately represent the class. The class is adequately defined for certification, and the Rule's general and uniform applicability to the entire class makes an injunction and declaration with respect to the entire class appropriate. The Court should accordingly certify the proposed class, and appoint Plaintiffs' counsel, along with counsel in the consolidated case *S.M.S.R. v. Trump*, as class counsel.

[11] This proposed class definition is substantively the same as that set forth in Am. Compl. ¶ 77, Dkt. 40, but has been modified after consultation with Plaintiffs' counsel in the consolidated *S.M.S.R. v. Trump* case so that the proposed class definition in each case is identical.

In addition, because the relief requested on behalf of the class as a whole will fully remedy the harm the Rule is causing to both adults and unaccompanied minors, Plaintiffs at this time are not seeking certification of a subclass of unaccompanied minors to bring Count 3 (TVPRA). Further, Plaintiffs do not seek class certification to pursue Count 2, which challenges the Rule's changes to expedited removal procedures under 8 U.S.C. § 1225 because of the bar set forth in Section 1252(e)(1)(B).

A. The Proposed Class Satisfies the Numerosity Requirement.

The proposed class satisfies the numerosity requirement. Under Rule 23(a)(1), class certification is appropriate only when the proposed class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). That is certainly the case here, where the Government's own estimates of the Rule's impact suggest that the proposed class consists of several thousand people. According to the Government, 396,579 people crossed the southern border without being inspected at a port of entry in FY 2018. *See* AR 011. The Government has stated that approximately 97,192 of these people were referred for credible fear interviews, 74,574 of whom passed. AR 012. Several thousand others who did not pass had their negative determinations reversed in subsequent hearings before an immigration judge. *See id.* Given this history, the Court can fairly infer that the proposed class is sufficiently numerous under Rule 23(a)(1). *See Coleman ex rel. Bunn v. Dist. of Columbia*, 306 F.R.D. 68, 76 (D.D.C. 2015) (stating that the Court may "draw reasonable inferences from the facts presented to find the requisite numerosity"); *Feinman v. F.B.I.*, 269 F.R.D. 44, 49 (D.D.C. 2010) ("The numerosity requirement can be satisfied '[s]o long as there is a *reasonable basis* for the estimate provided.'" (emphasis and alternation in original) (quoting *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 176 (D.D.C. 1999)); *see also Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 32 (D.D.C. 2003) (observing that courts in this district have found proposed classes of forty or more generally satisfy numerosity). In fact, the Government has conceded that there will be "a large number" of aliens who will be subject to a proclamation-based ineligibility bar. AR 003.

Joinder is impracticable in this circumstance for other reasons as well. First, joinder is inherently impracticable when "the class seeks prospective relief for future members, whose identities are currently unknown and who are therefore impossible to join." *DL v. Dist. of Columbia*, 302 F.R.D. 1, 11 (D.D.C. 2013). The proposed class seeks just such relief. Each day

that the Rule and Proclamation are in effect, new asylum seekers cross the southern border without inspection and face categorical ineligibility for asylum as a result. Second, joinder is impracticable when the putative class members would have great difficulty initiating individual suits. *See id.*; *Coleman*, 306 F.R.D. at 81. Here, many putative class members likely lack financial resources, have limited English language proficiency, and are unfamiliar with the American legal system. For these reasons, the proposed class satisfies Rule 23(a)(1).

B. The Proposed Class Satisfies the Commonality Requirement and the Proposed Class Representatives Satisfy the Typicality Requirement.

The proposed class also satisfies the commonality requirement of Rule 23(a)(2) and the typicality requirement of Rule 23(a)(3). Establishing commonality requires showing that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Typicality, meanwhile, is shown when "the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Bynum*, 214 F.R.D. at 35 (citing Fed. R. Civ. P. 23(a)(3)). These requirements "often overlap because both serve as guideposts to determine whether a class action is practical and whether the representative plaintiffs' claims are sufficiently interrelated with the class claims to protect absent class members." *Huashan Zhang v. U.S. Citizenship & Immigration Servs.*, 2018 WL 6308784, at *20 (D.D.C. 2018) (quoting *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 181 (D.D.C. 2015)).

As explained above, *see supra* at 4-5, the combined effect of the Rule and the Proclamation is to impose a categorical ban on asylum eligibility for certain asylum seekers based on their method of entry into the United States, despite the clear legislative directive in 8 U.S.C. § 1158(a)(1) that eligibility for asylum may not be contingent on manner or location of entry. Plaintiffs—asylum seekers subject to the categorical ban—have filed this class action because the Rule has the effect of precluding them from asylum eligibility. SMF ¶¶ 7-8, 17. Every named

plaintiff and every member of the proposed class faces the same consequences from the Government's unlawful act. Plaintiffs present claims with "overarching questions common to the class" addressing the "legal authority to implement" the challenged Rule, *see Nio v. Dep't of Homeland Sec.*, 323 F.R.D. 28, 32 (D.D.C. 2017), and the claims of the named plaintiffs "arise from the same course of conduct, series of events, or legal theories of other class members." *Hoyte v. Dist. of Columbia*, 325 F.R.D. 485, 490 (D.D.C. 2017). The proposed class therefore satisfies Rule 23(a)(2)'s commonality requirement, and Plaintiffs satisfy the typicality requirement of Rule 23(a)(3).

C. The Named Plaintiffs Will Fairly and Adequately Represent Absent Class Members.

Rule 23(a)(4) requires that before a class may be certified, Plaintiffs must demonstrate that they will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a)(4). Put differently, adequate class representatives "must not have antagonistic or conflicting interests with the unnamed members of the class," and they "must appear able to vigorously prosecute the interests of the class through qualified counsel." *Coleman*, 306 F.R.D. at 84 (quoting *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997)). This final prerequisite to class certification is intended to ensure that named plaintiffs are committed to resolving the case and are well prepared to do so. *See DL*, 302 F.R.D. at 15.

Plaintiffs' interests wholly align with those of absent class members, and they are well situated to adequately represent the class. Plaintiffs are asylum seekers who, under the Rule, are ineligible for asylum as a consequence of their method of entry into the United States. SMF ¶¶ 7-8, 17. They bring their claims on their own behalf and on behalf of thousands of others who cannot seek asylum, whether in removal proceedings or affirmatively, as a result of the illegal Rule. They have properly invoked the jurisdiction of this Court, their claims are ripe for adjudication, and they

have no conflict with the proposed class. *See* Exs. B, D, F, H. Plaintiffs are therefore adequate representatives of the proposed class under Rule 23(a)(4). *See, e.g.*, *DL*, 302 F.R.D. at 14-15; *Hoyte*, 325 F.R.D. at 491, 493 (observing that adequacy "is not a stringent requirement," and finding adequacy where "Plaintiffs all share the same interest" in obtaining relief from the government defendant's unlawful conduct); *Huashan Zhang*, 2018 WL 6308784, at *21 (finding adequacy even where some factual variation exists from plaintiff to plaintiff, because named plaintiffs face the same injury as class members based on the government's unlawful conduct and therefore their "interests are aligned with the rest of the class").

D. The Injunctive and Declaratory Relief Sought Will Remedy Harms to the Entire Class.

Rule 23(b)(2) provides that a class action may be maintained if the defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). That is precisely what has occurred here: the Government has imposed a categorical ban, broadly applicable to the Plaintiffs and the entire class they seek to represent. *See Bynum*, 214 F.R.D. at 37 (observing that satisfying Rule 23(b)(2) requires only "that a defendant 'has acted in a consistent manner toward members of the class so that his actions may be viewed as part of a pattern of activity'" (quoting 7A WRIGHT & MILLER § 1775 (2d ed. 1986))). The relief Plaintiffs seek—a declaration that the Rule is unlawful, and an injunction setting the Rule aside and lifting the ban—would put an end to the Government's illegal conduct towards every member of the proposed class "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see Huashan Zhang*, 2018 WL 6308784, at *21-22 (finding Rule 23(b)(2) satisfied where plaintiffs challenged an official policy of U.S. Customs & Immigration Services and that agency's interpretation of statutes and regulations, because the plaintiffs sought "declaratory and injunctive

relief that will benefit the class as a whole"); *Garcia Ramirez v. U.S. Immigration & Customs Enf't*, 2018 WL 4178176, at *29-30 (D.D.C. Aug. 30, 2018) (finding Rule 23(b)(2) satisfied where plaintiffs sought declaratory and injunctive relief invalidating a general policy applied by Immigration & Customs Enforcement); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 334-35 (D.D.C. 2018) (same); *R.I.L-R.*, 80 F. Supp. 3d at 182 (same); *Vargas v. Meese*, 119 F.R.D. 291, 296-97 (D.D.C. 1987) (finding Rule 23(b)(2) satisfied because the challenged Immigration & Naturalization Services regulation was "generally applicable to the class" such that "final injunctive relief or corresponding relief [was] appropriate with respect to the class as a whole").

E. The Court Should Appoint Undersigned Counsel, and Counsel for the Plaintiffs in the Consolidated Case *S.M.S.R. v. Trump*, as Class Counsel.

Undersigned counsel can adequately and vigorously represent the interests of the proposed class and, pursuant to Rule 23(g), should be appointed class counsel along with counsel in the consolidated case *S.M.S.R. v. Trump*.

As demonstrated by the attached declarations, counsel at Williams & Connolly LLP, Human Rights First, and the National Immigrant Justice Center are experienced in class action, complex civil litigation, civil rights, and immigrants' rights litigation. *See* Exs. L, M, & N (Declarations of Ana C. Reyes, Hardy Vieux, and Charles Roth). Counsel have worked diligently to identify, investigate, and pursue the class's potential claims, have the resources to assist the class in pursuing those claims, and will commit those resources to doing so. *See* Rule 23(g)(1).

In addition, as counsel in this case and counsel in *S.M.S.R.* have both done significant work to date and are working toward the common goal of setting aside the illegal Rule, it is appropriate for counsel in both cases to be appointed to represent the class. *See* Rule 23, Adv. Comm. Notes to 2003 Amend. (noting that class counsel may include "numerous attorneys who are not otherwise affiliated but are collaborating on the action").

* * *

Because Plaintiffs have satisfied Rule 23(a)'s prerequisites to class certification and properly defined a class under Rule 23(b)(2), the Court should certify Plaintiffs' proposed class.

CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court to certify the proposed class and enter summary judgment in favor of Plaintiffs.

Dated: January 4, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, on behalf of themselves and all others similarly situated *Plaintiffs*, v. DONALD J. TRUMP, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-2718-RDM [Consolidated with Civil Action No. 18-cv-2838-RDM]

PLAINTIFFS' STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h), Plaintiffs respectfully submit the following Statement of Material Facts Not in Genuine Dispute in support of their Motion for Summary Judgment.

1. On November 9, 2018, the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS") promulgated an interim final rule entitled "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims" ("the Rule"), EOIR Docket No. 18–0501; A.G. Order No. 4327–2018. AR 001-021.[1]

2. The Rule provides that noncitizens who apply for asylum after November 9, 2018 will be ineligible for asylum if they are "subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the [Immigration and Nationality] Act on or

[1] The Government has not yet filed the Administrative Record in this case, but it was previously filed in the *East Bay* case. *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-06810-JST (N.D. Cal. Dec. 1, 2018). The Government has stated that the record will be filed in this case with identical pagination as was assigned in the *East Bay* case, so Plaintiffs are citing to those page numbers.

after November 9, 2018," and have entered the United States contrary to the terms of such proclamation or order. AR 019.

3. In addition, the Rule provides that noncitizens who are ineligible for asylum pursuant to the Rule will not be permitted to make a showing of "credible fear" of persecution, as noncitizens seeking asylum were permitted to do before November 9, 2018. AR 019. Instead, the individual's asylum application is, from a merits standpoint, summarily denied, because the asylum officer is directed to "enter a negative credible fear determination with respect to the alien's application for asylum." AR 019.

4. The Rule further provides that an immigration judge is to review *de novo* the determination that a noncitizen falls within the scope of a presidential proclamation that is described in 8 C.F.R. § 208.13(c)(3) or § 1208.13(c)(3). AR 019. If the immigration judge determines that the noncitizen is not subject to a proclamation, then the asylum officer's finding will be vacated and DHS may commence removal proceedings under Section 240 of the INA. AR 020. If the judge agrees that the noncitizen is subject to a proclamation, the judge will then review the asylum officer's determination that the noncitizen lacks a reasonable fear of persecution pursuant to the procedures set forth in 8 C.F.R. § 1208.30(g)(2). AR 020.

5. Although the APA requires an agency to allow for a period of public notice and comment (as well as a 30-day waiting period) before implementing a proposed regulation, *see* 5 U.S.C. §§ 553(b), (c), (d), the Rule became effective upon its publication. AR 001. In explaining why they failed to follow the ordinary rulemaking process, DOJ and DHS claimed that "good cause" existed to bypass those procedures under 5 U.S.C. § 553(b)(B). AR 016.

6. On November 9, 2018, President Trump signed a presidential proclamation entitled "Addressing Mass Migration Through the Southern Border of the United States" ("the

Proclamation"). The Proclamation provides that entry of "any alien" into the United States across the international boundary between the United States and Mexico is "suspended and limited" for a period of 90 days, Proclamation, 83 Fed. Reg. at 57,663 § 1, at which point the President will decide whether to extend the suspension period, *id.* § 2(d).

7. Plaintiffs are noncitizens who are presently in the United States and wish to seek asylum. *See* Mot. for Summ. J., Exs. A, C, E, G, I, J, K.

8. Each plaintiff crossed the border from Mexico into the United States other than at a port of entry. *See* Mot. for Summ. J., Exs. A, C, E, G, I, J, K.

9. After plaintiffs O.A. and K.S. entered the United States, they were served with Notices to Appear in immigration court (NTA). *See* Dkt. 36; Notices to Appear of O.A., K.S.[2] The original NTAs were served on them on November 15, 2018, and they ordered O.A. and K.S. to appear in immigration court in North Carolina on January 31, 2019. Notices to Appear of O.A., K.S.

10. On December 17, 2018, the same day that this Court heard oral arguments on Plaintiffs' request for a Temporary Restraining Order, the Government issued new hearing notices to O.A. and K.S., instructing them to appear in immigration court on November 19, 2019. Notice of Hearing in Removal Proceedings of O.A., K.S.

11. After plaintiffs D.S. and C.A. entered the United States, they were served with NTAs. *See* Dkt. 36; Notices to Appear of D.S., C.A. The original NTAs were served on them on November 14, 2018, and they ordered D.S. and C.A. to appear in immigration court in Atlanta on January 31, 2019. Notices to Appear of D.S., C.A.

[2] Defendants have filed Notices to Appear and other immigration documents for plaintiffs O.A., K.S., D.S., C.A., and G.Z. with the Court under seal. *See* Dkt. 37.

12. On December 17, 2018, the same day that this Court heard oral arguments on Plaintiffs' request for a Temporary Restraining Order, the Government issued new hearing notices to D.S. and C.A., instructing them to appear in immigration court on January 7, 2019, and changing the location of their hearing from Atlanta to New Orleans. Notice of Hearing in Removal Proceedings of D.S., C.A.

13. Plaintiff G.Z., who is an unaccompanied immigrant child, received an NTA on November 11, 2018. *See* Dkt. 36; Notice to Appear of G.Z.

14. Plaintiff A.V. was detained at the time of filing this case. Dkt. 36; I-213 of A.V. Her criminal case remains pending as of January 4, 2019.

15. At all relevant times, A.V. has been and is subject to expedited removal. Dkt. 36.

16. Plaintiffs D.R., P.R., and G.R. were added to this suit on December 18, 2018. Dkt. 40. As of that date, they were each subject to expedited removal. As of January 4, 2019, D.R., P.R., and G.R. are detained.

17. The government has asserted that the Rule is applicable to each plaintiff.

Dated: January 4, 2019

Respectfully submitted,

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EXHIBIT A

DECLARATION OF OA

1. My name is [redacted]. I am a 23-year-old man from Honduras. I was born in [redacted] Honduras on [redacted]. I lived with my parents and siblings in [redacted] until I was about 18 years old, when my family and I moved to [redacted] after the MS gang killed my older brother.

2. I have a four-year-old daughter named [redacted]. She was born [redacted]. We had to leave Honduras because I fear for my life for the reasons explained below.

3. Unfortunately, the death of my older brother years ago was not the end of my family's problems. After my older brother was killed, my younger brother, [redacted], and I moved to [redacted], a different part of Honduras. We both worked for transportation companies for some time without any problems. We were helpers on the buses; our job was to collect the bus fare from passengers and help them with their bags.

4. For several years, the Mara-18 (M-18) gang had been extorting the transportation company where we worked, and it was well known that gangs targeted transportation operations. We continued the work, though, because they were good jobs and the owner usually paid the monthly "rent" to the gang to make sure that they avoided any problems.

5. The rent continued to increase over time, and in 2016, the owner decided not to pay the extra rent because he could not afford it. He still paid some rent, just not the extra. Word of this decision to stop paying the increases made its way to a leader of the M-18 in our area. He was in prison at the time, but even from jail he would call the bus drivers to collect rent.

6. In addition to refusing to pay the rent, one of the drivers apparently insulted the leader of the gang during one of these extortion calls, telling him he was a dog in prison and wasn't worth anything. Although I was not there at the time, news of this traveled fast. I found out because the other bus drivers were talking about it. This was the rumor going around among the other bus drivers. I think I heard this from four or five of them.

7. Apparently, after hearing these comments, the leader of the gang ordered the death of this bus driver. The next day, that bus driver suspected that he would be at risk, so he asked a different driver to switch shifts with him that day. My brother [redacted] did not know about this and went on the bus with this substitute driver. The M-18 killed both the substitute driver and [redacted]

8. I think the M-18 ordered the hit on this bus because the company did not pay the extra rent and because the driver had insulted the gang leader. The M-18 also left a note taking credit for the deaths. I did not have the note myself, but I learned about it from the police.

9. Around the same time, two women who were involved in the M-18 killed the driver of a different bus. There were security cameras on that bus so the police knew exactly who

had killed the driver. There were no security cameras on the bus that my brother was on when he was killed, but I think the same two women killed my brother.

10. The police started to investigate the deaths of these transportation workers. The case of the other driver was straightforward because of the camera footage. The case of my brother was more difficult.

11. After what happened, I wanted justice for my little brother. I wanted the responsible individuals to pay for what they had done. I worked with the police in the investigation of my brother's death. I went with my sister and the police to the crime scene and to the cemetery. I also went to the morgue. I started working with the police within a couple of weeks of my brother's death.

12. After my brother was killed, and while I was helping the police, someone sent my sister a picture of my little brother's body. The police wanted us to find out who had sent the picture. My sister figured out whose phone number had sent the pictures, and we [redacted] found that person. We [redacted] asking her if she was the one who had sent the photo. She said no, that somebody else had to have taken the photo. We tried to follow this lead, but nobody would help us out of fear.

13. The gang found out that I was involved in helping the police investigate the death of my brother. I'm not certain how they found out, but I imagine that they saw me with the police or heard from other people that I was helping the police with the investigation.

14. After that, the gang was furious that I was helping the police. At first, they made threatening phone calls from different numbers telling me that they had found out that I wanted to make a complaint against them. They said that if I did that, the same thing that happened to my brother would happen to me and to my whole family. They said it was better for me to leave and to stop helping the police. I think they make threats like this by phone like this because they want us (the victims) to hear their voices so that you feel terror. When they see you in person, it's not to threaten you, it's to kill you.

15. Then, later when I did not immediately stop helping the police, they burned our house down and we barely escaped with our lives. They also kept making the threatening calls. They said they wanted to kill me, my daughter, and my family because I had helped the police in the investigation of my brother's death. The threats were against our whole family, but they only came to my cell phone. My younger sister fled to the United States because of this, fearing for her life.

16. I did a variety of things to try to keep myself and my daughter safe from these threats. I changed my phone number. I tried to flee, to hide. I went into hiding on my own and also with my daughter. My daughter's mother separated from me because she was afraid given what had happened.

17. After some time in hiding, I eventually came back work. I traveled through [redacted] because I needed to for work, but I stayed in apartments in [redacted]

because I didn't want to live in [redacted]. I got a different job, but after a while the gang found out that I was back and resumed threatening me. Again, they said they would kill me, my daughter, and my parents. They also specifically referenced the fact that they were the M-18 and that they would be able to find me wherever I went.

18. They told me I could not report to the police, and based on my own experience I knew this to be true. They were bothering me because I had gone to the police, so I knew that reporting these threats to the police would do no good. Also, Honduras is a corrupt country and I believe the gang is involved with the police. I think this link is how the gang member who was in jail was able to order a kill even while he was in jail.

19. Fearing for my life and that of my daughter, I fled Honduras with my daughter.

20. We left Honduras alone in a bus. We did not have money to pay for a guide. When we were in Guatemala, we met a man from Honduras who helped us figure out where to go. We walked and took buses. We stopped in Mexico City to transfer buses. The journey was extremely difficult.

21. When we got to the U.S.-Mexico border, we saw that there were a lot of police officers and also that there were migrants. I did not know where the port of entry was, and I also did not know that there was a rule that I would only be able to seek asylum if I entered at the port of entry.

22. Because I did not know that I had to go to the port of entry, I followed what I saw other people doing and crossed over the river with my daughter. We crossed on Tuesday, November 13, 2018. Once we had crossed the river I looked for an immigration officer to present myself to so I could ask for asylum. I thought this was how the process worked.

23. Shortly after we entered, I don't remember exactly how long, two immigration officials came up to us. I told them that we were afraid to go back to Honduras. They told us the government was no longer helping people. They threatened to deport us. I told them that I was fleeing with my daughter. I told them I could not go back to my country because I would be dead.

24. Once we were inside the detention, no one took a declaration from us. I spoke to one officer and told him that we were afraid to return. I am unsure what to expect next.

25. I do not have any money to support myself, and I would not have had money to spend to support myself in Mexico either. For now, I have to rely on my sister for support. If I have the opportunity to apply for asylum, I can request a work permit and I can start giving my daughter the life that she deserves.

26. For me it is very important that the government lets me seek asylum. I think everyone should have the right to ask for protection. If someone flees from their country it's because they have to. I never would have chosen to come to the United States. I had no choice.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by LYNN STOPHER.

Executed on November 19, 2018, in the city of EL PASO.

[redacted]
Signature [redacted]

Certificate of Translation

I, LYNN STOPHER, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on November 19, 2018.

Lynn E Stopher
Signature

11/19/18
Date

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	Civil Action No. 1:18-cv-02718-RDM

DECLARATION OF O[redacted] A[redacted]
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I, [redacted], state and declare the following under penalty of perjury and pursuant to 28 U.S.C. § 1746:

1. My name is [redacted]. I am a 23-year-old man from Honduras. I am a named plaintiff in the above-referenced case. The facts in this declaration are within my personal knowledge. I can and will testify truthfully to them if called to do so.

2. I entered the United States without being inspected at a port of entry on or about November 13, 2018, near El Paso, Texas. I came to the United States with my minor daughter, K[redacted] S[redacted], who is also a plaintiff in this case.

3. We entered the United States fleeing for our lives and with the intention to seek asylum. I have provided details about my reasons for seeking asylum in a separate declaration to this Court, which I submitted in support of a motion for a temporary restraining order. *See* Dkt. No. 6-4, Mtn. for TRO, Ex. A. I have not repeated those details here.

4. As of January 4, 2019, I have mailed my application for asylum to the Immigration Court in North Carolina, where I am currently living.

5. I came to the United States fleeing for my life, and I am committed to pursuing my right to seek that protection. My ability to seek asylum stands to be denied by Defendants' actions barring asylum to noncitizens, like me, who entered the United States without being inspected at a port of entry after November 9, 2018. If those actions are upheld, I will lose my ability to seek asylum in this country.

6. I think the ability to seek asylum in the United States is an important right that should be protected, and I am committed to pursuing that goal in this case.

7. I understand that I have a responsibility to remain in contact with my attorneys for the duration of this case and that I may be called upon to testify about it. I further understand that I cannot leave the United States while this action is pending or while my separate immigration matter is pending. Finally, I understand that my immigration case is distinct from this case.

I declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, memory, and belief.

Executed on the 3rd of January 2019, in Raleigh, North Carolina.

[redacted]

03/01/19
Date

CERTIFICATE OF TRANSLATION

I, Giana Borrato, swear under penalty of perjury that I speak English and Spanish and that I have translated this document to the best of my ability. I reviewed this document with Plaintiff and have incorporated any changes or corrections that he provided. I declare under penalty of perjury that the foregoing statement has been faithfully translated/executed to the best of my knowledge, memory, and belief.

Giana Borrato

01/03/2019
Date

EXHIBIT C

DECLARATION OF AV

I, [redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born [redacted] in [redacted] Honduras and I am 27 years old. In Honduras, I lived in [redacted] with my mother and my two children, aged eight and four. Before that, I lived in the same town with my former partner and my children and when I was a child I lived there with my mother and father. I fled Honduras six weeks ago because I fear for my life.

2. I had to flee Honduras on or about September 30, 2018 after suffering severe physical abuse and death threats from my former partner and the father of my two children. He has been very physically and verbally abusive to my family and me for eight years.

3. I met my former partner in 2009 and he began physically abusing me when around the time I became pregnant with my son about eight years ago. He also controlled my life. When he beat me, he would grab my hair, throw me across the room, and hit me. I have a large scar on my arm from when he pushed me very hard and I fell onto a rock. I also have a large scar on my knee and thigh from when he beat me with a machete when I tried to run from him. This happened when I was six months pregnant with my daughter, around March 2014.

4. I first tried to leave my former partner when my son was about six months old, around December 2010. I left him because he was abusing me very badly multiple times per week. My father saw the abuse and came to bring me back to the family home. After this, he would commonly threaten my father because my father had tried to defend me.

5. On [redacted], 2011, only a couple of months after I left my former partner, my father was found murdered. He was brutally murdered by a machete, a weapon that the gangs in Honduras commonly use to kill people. My former partner also later told me, "I killed your father, I'll do the same to you if you don't obey me." After this, I returned to live with my former partner because I was afraid of what he would do to me if I didn't.

6. I later tried to separate from my former partner again after my daughter was born in 2014. Even though I went periodically to stay with my mother around this time, he kept coming to my mother's house and threatening me and beating me. He would also force me to return to stay with him.

7. My former partner never physically abused my children, but he did verbally abuse them, calling them names, such as "perros" (dogs). When I tried to defend them, he would beat me. My children are currently staying with my mother and I fear for their safety, as well as the safety of my mother.

8. During the last year I was in Honduras, I was separated from my partner and living with my mother and two children. Even so, he continued to threaten and beat me despite the fact that we were living separately. He would not allow me to speak with any other men or he would beat me. He would also beat me because I did not earn enough money to support our children and since he did not provide any financial assistance to them, I was unable to provide certain things for them.

9. Two days before I left, an acquaintance of my former partner showed up at my door. He had a clown tattoo on his arm, a common symbol in Honduras of the gangs. He threatened me that I had to leave the country and find work to support my children. If I

did not leave the country and send money back, he said my former partner would find me and murder me. My former partner has contacted my mother since I left Honduras, threatening that I need to begin working and send money.

10. Despite suffering years of abuse in this relationship, I did not go to the police because I knew that they would be unwilling to help me, and I feared that my husband would find out and kill me. I know that the police frequently release criminals from jail even if they are guilty. For example, a woman in my neighborhood tried to strangle her child and the police arrested her but released her within one week.

11. I also fear that my former partner may be a gang member and could use his ties to the gang to retaliate against me for going to the police. I believe this in part because I know he was working and hanging out with other people in our neighborhood, including the acquaintance who came to my mother's house before I left Honduras. He would go out with these men in the evening together–a common thing that gang members do. My former partner also had no formal work through which he earned money.

12. I had to leave Honduras six weeks ago because of the issues discussed above. I decided to leave at this time because of the threat from my husband's acquaintance.

13. Before I made the decision to flee my country, I tried to leave my relationship several times, but was unsuccessful. Each time I tried to leave he would seek me out and threaten and beat me until I came back. Since I left Honduras to come to the United States, my former partner has asked my mother for information on my whereabouts. I fear that if I do not obey him and support our children, my mother will be in danger.

14. If I went back to Honduras I think the father of my children would kill me. He has threatened to kill me several times and has physically and verbally abused me for several years. I would be directly disobeying him if I returned.
15. The decision for me to leave my country was a difficult one, but I had no choice as I knew that my life would be in danger if I remained in Honduras. I did not want to come to the United States as I had to leave my two children behind. I would much rather be at home taking care of my two children and caring for my daughter who has asthma. I also do not have any family in the United States. I only have a friend in Washington D.C.
16. In order to make the journey to the United States, I had to use all of my savings. In Honduras I worked as a cleaner on a farm and through this I saved about 2,000 lempiras (about $82). I brought this money with me, but it did not last very long.
17. I traveled through Guatemala for three days and through Mexico for a little under six weeks. I traveled by train and foot. The journey was difficult because I did not have much money so slept on the train. There were many nights that I did not sleep, and I often went three to four days without eating because I did not have any money. I had to rely on other people giving me food for free to eat.
18. I entered the United States without inspection on Sunday, November 11, 2018. I entered in this manner because I did not know that entering at a port of entry was a possibility. I was apprehended by Customs and Border Patrol and charged with illegal entry.
19. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, however, I am facing a difficult situation. I

cannot go back to my country because my life is in danger there for the reasons discussed above.

20. I need to reach the United States and ask for protection because there is no other way for me to seek safety from the violence that my family and I suffered in Honduras.

21. I am also worried about how my situation will affect my mother and children. I fear that my former partner will hurt my mother if I do not obey him. I also fear that he will begin to abuse my children.

22. I hope through this case, I am able to present my application for asylum. I am committed to this case, but because I am afraid of being harmed in my country, I also ask that my name not be included in public documents. I fear that if my name is publicized, my family will be placed in greater danger than they already are. I could never forgive myself if something happened to my family.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by Alexander Parcan.

Executed on November 13, 2018, in the city of San Diego.

[redacted]
Signature

Certificate of Translation

I, Alexander Parcan, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on November 13, 2018.

Signature

11/13/2018
Date

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	Civil Action No. 1:18-cv-02718-RDM

DECLARATION OF A[redacted] V[redacted]
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I, A[redacted] V[redacted], state and declare the following under penalty of perjury and pursuant to 28 U.S.C. § 1746:

1. My name is [redacted]. I am a 27-year-old woman from Honduras. I am a named plaintiff in the above-referenced case. The facts in this declaration are within my personal knowledge. I can and will testify truthfully to them if called to do so.

2. I entered the United States without being inspected at a port of entry on or about November 11, 2018, near San Diego, California.

3. I entered the United States fleeing for my life and with the intention to seek asylum. I have provided details about my reasons for seeking asylum in a separate declaration to this Court, which I submitted in support of a motion for a temporary restraining order. *See* Dkt. No. 6-4, Mtn. for TRO, Ex. B. I have not repeated those details here.

4. I came to the United States fleeing for my life, and I am committed to pursuing my right to seek that protection. My ability to seek asylum stands to be denied by Defendants' actions barring asylum to noncitizens, like me, who entered the United States without being inspected at

a port of entry after November 9, 2018. If those actions are upheld, I will lose my ability to seek asylum in this country.

5. I think the ability to seek asylum in the United States is an important right that should be protected.

6. I understand that I have a responsibility to remain in contact with my attorneys for the duration of this case and that I may be called upon to testify about it. I further understand that I cannot leave the United States while this action is pending or while my separate immigration matter is pending. Finally, I understand that my immigration case is distinct from this case.

I declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, memory, and belief. It was read back to me in my native language of Spanish by Sugeily Fernandez.

Executed on the January 4, 2019 in Washington D.C.

[redacted]

1-4-2019
Date

CERTIFICATE OF TRANSLATION

I, Sugeily Fernandez, hereby certify that I speak English and Spanish fluently. I translated this document in its entirety to [redacted] and have incorporated any changes or corrections that she provided. I declare under penalty of perjury that the foregoing statement has been faithfully translated/executed to the best of my knowledge, memory, and belief.

Signature

01/04/2019
Date

EXHIBIT E

DECLARATION OF GZ

I, [redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born [redacted] in [redacted] Honduras, and I am seventeen years old. In Honduras, I lived in [redacted] with my dad. I had to flee Honduras about two months ago because the MS gang was trying to recruit me and they threatened to kill me multiple times. My dad was also very abusive toward me for as long as I can remember. If I had to stay in Honduras, I think the gang would kill me because I refused to join them, and I also worry that my dad would continue to hurt me.

2. Since I was little, my dad was extremely violent toward me. He would get very angry and then he would start hitting me hard with whatever he could find. The beatings sometimes happened a few times a week and they left me with bruises. It made me feel sad and scared when he would hit me like that. I think my dad treated me this way because I am his son and it's his right to do that.

3. The neighbors could hear my dad abusing me, because he would scream loudly. Even though they could hear, the neighbors never tried to help me. I think they did not want to get involved in my family's business. The neighbors told me that my dad used to hit my mom the same way, and that is why she had to come to the United States. I was very little when she came, so I do not remember.

4. I never went to the police to try to report my dad's abuse because my dad is a police officer. [redacted] I do not think the police would do anything to protect me from another police officer.

5. About two weeks before I left for the United States, I started having problems with the MS 13 gang. [redacted]

6. They told me they wanted me to join them. I was so afraid that I did not say anything. I just stood there. They said I knew what would happen if I did not join. I interpreted this to mean they would kill me, because I know gang members kill people who refuse to join them. After that, they drove away.

7. The second time the gang members approached me, [redacted] they drove up to me on their motorcycles again. They were carrying guns and they called me by my name. They asked me if I had thought about joining them. I told them I needed more time to think, hoping they would give me a little more time, and they drove away. I felt scared and worried that they were not going to leave me alone.

8. The gang members approached me four more times in just a short time. Each time, they drove up to me on their motorcycles and asked me about my decision. The last time they approached me, they said they had given me plenty of time to think. They said they were not playing around and that I had better get with the program if I did not want to die. I knew they would kill me if I said no, so I told them again that I needed to think about it. They pointed their guns at me and I felt really scared. I thought they were going to shoot and kill me right there. One of the men took the butt of his gun and he hit me hard in the chest. It hurt a lot because he did it so forcefully. They were angry and they told me I had one more week to decide or they would kill me.

9. After that I knew I had to leave Honduras or the gang members would follow through on their threat to kill me. I am against the gangs and the bad things they do. They make money by killing people and selling drugs. I did not want to join them, but I knew if I refused, they would kill me. I believe they will kill me because they asked me to join them many times and they were not going to take no for an answer.

10. I took this threat seriously because of what happened to others I know. I had a friend named [redacted] who was also being recruited. He tried to get away by moving to a different part of Honduras. Shortly after he moved, he went missing. Eventually, they found his body chopped into pieces. Everyone said the gangs killed him because he did not want to join them. I worry the same thing would happen to me.

11. I did not report the incidents with the gang members to the police because the gangs buy off the police, so I do not think the police can do anything to control them or to help me. Even though my dad is a police officer, I did not tell my dad what happened because I did not want to put him in danger. If he had tried to intervene, it would have gotten him killed. I just told my dad that I wanted to live with my mom in the United States.

12. I do not think I could live anywhere else in Honduras and be safe. The gangs control everything and I think they would find me anywhere and kill me, like they did to my friend, [redacted]. I also do not have anyone else to live with in another part of Honduras.

13. I knew I had to leave before the week was up or the gang members would kill me. I gathered some money that I had saved and asked my dad to help me with the rest. Within the week, I set out for the United States with a friend. We traveled mostly on foot and by riding on top of trains. The journey was difficult, tiring, and dangerous.

14. In Mexico, I was walking along some train tracks, when some guys approached me and pointed their guns at me. They demanded all the money I had, so I gave them everything. It was really scary, but I felt lucky that they had not kidnapped me or hurt me. I know these things happen to other immigrants.

15. After that happened, I could not continue on without any money. I did not even have money for food. I was so hungry and I did not know what to do. I ended up finding a job at a tortilla shop, where I worked for about two weeks to earned money to continue.

16. I eventually made it to the border near New Mexico. I was traveling with other immigrants and they seemed to know the way, so I followed them. Sometimes we had to ask people where to go. I knew that some people could go through a line and talk to immigration to cross the border, but I thought you needed papers to enter that way. I did not think they would let me in through the line, since I did not have papers, so I followed the others I was with.

17. On Friday, November 9, 2018, we finally arrived near the border with New Mexico. It was the middle of the night when we reached a wall and then jumped over into the United States. I looked for immigration officers because I wanted to turn myself in. I thought they would help me because I am danger in Honduras. Eventually, I found an immigration post and walked up to the officers, who took me into custody. After some time, I was taken to a shelter for unaccompanied minors, where I am now. I hope to be released to my mom.

18. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, however, I am in a difficult situation. I cannot go back to Honduras because my life is in danger there. I know the gangs will kill me if I go back and I believe my dad will continue hurting me.

19. If I cannot apply for asylum, I think I should leave and come back and enter at the line, now that I understand that this is possible. But I am afraid to have to pass through Mexico again, because I was robbed there and I know it is very dangerous there. I could not stay in Mexico because I do not know anyone there who could take care of me.

20. I hope through this case, I am able to present my application for asylum.

21. I am committed to this case, but because I am afraid of being harmed, I also ask that my name not be included in public documents. I fear that if my name is publicized, my family will be in danger. I worry the gang members would go after my father if they find out I am here in the United States. If I had to go back to Honduras, I worry that I will be in greater danger if the gang finds out I was here. They only gave me one week to think about joining and they will be angry that instead I fled to the United States.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by Gianna Borroto.

Executed on November 16, 2018, in the city of Des Plaines, IL

[redacted]
Signature

Certificate of Translation

I, Gianna Borroto, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on November 16, 2018.

Signature

11/16/2018
Date

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants.*	Civil Action No. 1:18-cv-02718-RDM

DECLARATION OF G[redacted] Z[redacted]
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I, [redacted], state and declare the following under penalty of perjury and pursuant to 28 U.S.C. § 1746:

1. My name is G[redacted] Z[redacted] I am a 17-year-old boy from Honduras. I am a named plaintiff in the above-referenced case. The facts in this declaration are within my personal knowledge. I can and will testify truthfully to them if called to do so.

2. I arrived at the Mexico side of the United States border late at night on November 9, 2018, at a place that I do not know. I entered the United States later. According to the papers filed in my immigration case, I entered near Lordsburg, New Mexico, on November 10, 2018.

3. I entered the United States fleeing for my life and with the intention to seek asylum. I have provided details about my reasons for seeking asylum in a separate declaration to this Court, which I submitted in support of a motion for a temporary restraining order. *See* Dkt. No. 6-3, Mtn. for TRO, Ex. C. I have not repeated those details here.

4. I am currently scheduled to appear in Immigration Court on January 17, 2019, at 1:00 p.m. I am working on my asylum application and will submit it after it is finalized.

5. I came to the United States fleeing for my life, and I am committed to pursuing my right to seek that protection. My ability to seek asylum stands to be denied by Defendants' actions barring asylum to noncitizens, like me, who entered the United States without being inspected at a port of entry after November 9, 2018. If those actions are upheld, I will lose my ability to seek asylum in this country.

6. I think the ability to seek asylum in the United States is an important right that should be protected, and I am committed to pursuing that goal in this case.

7. I understand that I have a responsibility to remain in contact with my attorneys for the duration of this case and that I may be called upon to testify about it. I further understand that I cannot leave the United States while this action is pending or while my separate immigration matter is pending. Finally, I understand that my immigration case is distinct from this case.

I declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, memory, and belief.

Thank you for considering my statement.

I declare under penalty of perjury under the laws of Illinois and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, memory, and belief.

Executed on the 12/26/2018, in Chicago, Illinois.

[redacted]

German Madrid Zepeda

12/26/18

Date

CERTIFICATE OF TRANSLATION

I, Gianna Borrato, swear under penalty of perjury that I speak English and Spanish and that I have translated this document to the best of my ability. I reviewed this document with [redacted] and have incorporated any changes or corrections that he provided. I declare under penalty of perjury that the foregoing statement has been faithfully translated/executed to the best of my knowledge, memory, and belief.

Gianna Borrato

12/26/2018

Date

EXHIBIT G

DECLARATION OF DS

I, [redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born [redacted] in [redacted] and I am 43 years old. In Honduras I lived in [redacted] with my partner, [redacted], and our children, including my youngest son [redacted], who is here with me in the United States. Before moving in with Gerardo, I lived in [redacted] with my parents. I had to leave Honduras because I fear for my life for the reasons explained below.

2. I began living with my partner [redacted] in around 1996. Almost immediately, he became abusive. He beat me regularly, including when I was pregnant. One time I was pregnant and he hit me so much my face was swollen. [redacted] was a very violent and machista man. He thought I was his property, that I was a worker in his home. Another time, he [redacted] cut me, leaving a large scar on my shoulder. He raped me many times. He told me he would kill me if I left him and that he would kill my mother after that. He regularly beat our children as well.

3. I didn't go to the police for many years because he constantly threatened to kill me and I was afraid of him. He worked as a security guard and had a gun. One time, he threatened to kill me at gunpoint, but our oldest son intervened and tried to defend me.

4. In around March 2017, [redacted] threatened to cut my face open with a machete. After this, I felt like I couldn't take it anymore. I went to the prosecutor and made a report, but they didn't arrest [redacted]. They just set a time for him to go to court, but he did not show up. Neither the prosecutor nor the police did anything when he didn't show up and from there I knew that I could not count on the police to protect me or help me.

5. I went to [redacted] for about a week after I made the report and stayed with my brother, but [redacted] threatened to kill my mother if I didn't return, so I did. I was also worried about my children. After that, I lived with him for a little more than a year and then fled to United States on around October 30, 2018, because I couldn't take it anymore and I knew he would never change. I thought he would eventually kill me if I didn't leave.

6. I brought my youngest son, sixteen-year-old [redacted], with me to the United States. I decided to bring [redacted] and not the other kids because he was the youngest, and because the gangs were bothering him, trying to get him to join them. My oldest two kids are not living at home so I thought they would be at the least risk.

7. Before I made the decision to flee my country, I tried to move away from my hometown. I went to [redacted] to stay with my brother after I made the police report, but [redacted] knew where I was and threatened my family if I didn't return.

8. If I went back to [redacted], I think [redacted], will continue to abuse me and my kids. I am afraid he will kill me as he threatened to do many times. The Honduran government won't protect me from him. They didn't do anything when he didn't show up to court.

9. The decision for me to leave my country was a difficult one. I did not want to come to the United States, but I had to because my partner would not stop beating me, and I was afraid he was going to kill me.

10. My son and I traveled through Mexico for about two weeks to get to the United States. It was very difficult and sometimes we didn't have food for days. In fact, much of this journey was very difficult for us given our limited financial resources. I spent all of my savings to make the journey and did not even have enough money to make it here. In the United States, I am counting on a relative who lives here to help me get settled.

11. When we first made it to the border near Juarez, Mexico, we saw a lot of U.S. soldiers blocking the entrance and other immigrants told us the border was closed. I believe the soldiers were American because I saw the flag on their uniforms, but it is possible that some of them were also Mexican soldiers. We did not think the soldiers would let us pass and we were afraid of what they would do if we tried.

12. We stayed in Mexico for three days because of that. Juarez felt very dangerous to me. I saw men with large guns there; I think they were part of the cartels. People in Juarez would talk about them as being part of a cartel. I was afraid of being kidnapped or killed if we stayed in Juarez.

13. Because of this fear, and since we thought the border was closed, we crossed the river to enter the United States on November 13th. Soon after we entered, we came across immigration officials who told us we had to go back. They said we couldn't seek asylum if we entered through the river so we had to go back. We told them that we couldn't go back, and that we didn't know how could we enter anywhere else when the border is militarized. After that, the immigration officials took us in their patrol car to the immigration station.

14. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, my son and I are in difficult situation. We cannot go back to Honduras because our lives are in danger there because of [redacted].

15. I am also worried about how my situation will affect my other children who are still in Honduras. My 18-year-old son, [redacted], is still living with [redacted] and I am very worried about him. My [redacted]

16. I hope through this case, I am able to apply for asylum. I want to pursue this case, but I am afraid of my partner finding out about where I am and what I'm doing. I therefore ask that my name not be included in public documents. I fear that if my name is publicized, my family will be placed in greater danger than they already are, especially my son who is still living with [redacted] and my mother. I could never forgive myself if something happened to my family. I am also afraid that [redacted] could find me if my name were publicized.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by Amanda Crews Sletzk.

Executed on November 17, 2018, in the city of El Paso, Texas.

[redacted]
Signature

Certificate of Translation

I, Amanda Crews Sletzk, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] Spanish on November 18, 2018.

Amanda Crews Sletzk
Signature

11/18/18
Date

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	Civil Action No. 1:18-cv-02718-RDM

DECLARATION OF D[redacted] S[redacted]
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I, [redacted], state and declare the following under penalty of perjury and pursuant to 28 U.S.C. § 1746:

1. My name is D[redacted] S[redacted]. I am a 43-year-old woman from Honduras. I am a named plaintiff in the above-referenced case. The facts in this declaration are within my personal knowledge. I can and will testify truthfully to them if called to do so.

2. I entered the United States without being inspected at a port of entry on or about November 13, 2018, near El Paso, Texas. I came to the United States with my minor son, C[redacted] A[redacted], who is also a plaintiff in this case.

3. We entered the United States fleeing for our lives and with the intention to seek asylum. I have provided details about my reasons for seeking asylum in a separate declaration to this Court, which I submitted in support of a motion for a temporary restraining order. *See* Dkt. No. 6-4, Mtn. for TRO, Ex. D. I have not repeated those details here.

4. I am currently scheduled to appear in Immigration Court on January 7, 2019, at 9:30 am, but I believe the hearing may be canceled due to the government shut down. I am working on my asylum application and will either submit it at that hearing or soon after it is finalized.

5. I came to the United States fleeing for my life, and I am committed to pursuing my right to seek that protection. My ability to seek asylum stands to be denied by Defendants' actions barring asylum to noncitizens, like me, who entered the United States without being inspected at a port of entry after November 9, 2018. If those actions are upheld, I will lose my ability to seek asylum in this country.

6. I think the ability to seek asylum in the United States is an important right that should be protected, and I am committed to pursuing that goal in this case.

7. I understand that I have a responsibility to remain in contact with my attorneys for the duration of this case and that I may be called upon to testify about it. I further understand that I cannot leave the United States while this action is pending or while my separate immigration matter is pending. Finally, I understand that my immigration case is distinct from this case.

I declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, memory, and belief.

Executed on the 3rd of January of 2019, in Madison, Alabama.

[redacted]

01/03/2019
Date

CERTIFICATE OF TRANSLATION

I, Camila Di Mauri, swear under penalty of perjury that I speak English and Spanish and that I have translated this document to the best of my ability. I reviewed this document with Plaintiff and have incorporated any changes or corrections that she provided. I declare under penalty of perjury that the foregoing statement has been faithfully translated/executed to the best of my knowledge, memory, and belief.

Camila Di Mauri

Camila Di Mauri

01/03/2019
Date

EXHIBIT I

DECLARATION OF D[redacted] R[redacted]

I, D[redacted] R[redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born on July 2, 1960, in [redacted], El Salvador. Before coming to the United States, I lived with my daughter, [redacted], in [redacted] El Salvador. I fled El Salvador with my daughter about two months ago because I fear for our lives.

2. I had to flee El Salvador on or about September [redacted], 2018, after my daughter and I suffered violent abuse and death threats from members of the [redacted] political party and the Salvadoran police.

3. I joined [redacted] in 2014. I had various responsibilities, including conducting censuses in various towns and posting campaign information for [redacted] candidates in these towns.

4. Throughout my time in [redacted] I saw some corruption. In 2017, however, my daughter and I witnessed a [redacted] party leader falsify papers related to the February 2019 presidential election. We refused to help commit election fraud. After that, my daughter and I began receiving threats. The threats mainly came from leaders of the municipality and the party.

5. On September [redacted], 2018, my daughter and I did not attend a party meeting that we were supposed to go to. The following day, we received a threatening phone call. The person on the other end of the line called us "perras" (bitches) and told us that we were alone and that no one would protect us.

6. On September [redacted], 2018, five uniformed police officers showed up at our home and beat us badly. They shouted at us. Once they finished beating us, they went outside and shot at

our house with guns. They then doused it in gasoline and lit it on fire. As the house began to catch on fire, we managed to escape through the back door. My daughter had to help me climb over the fence since her leg was badly injured.

7. We still have bruises all over our bodies from this beating. I have bruising and pain in my leg and my daughter has a lot of pain in her back.
8. We did not report the abuse to the police because the police had attacked us. The party has bought the police and controls them. They use the police to keep people quiet and the police turn the other way when the party hurts someone.
9. If I went back to El Salvador, I know that [redacted] would kill us. I know this because in August 2018 they murdered the daughter of a family friend who also tried to leave the party. This party member and his wife also fled the country.
10. My daughter and I did not want to leave El Salvador. My daughter was studying business administration and had two years of school left. We also had to leave without any of our possessions. All we had were the clothes on our backs.
11. We traveled through Guatemala and Mexico from September 15 to November 13. We traveled by car and bus. The journey was very difficult. We ran out of money and relied on the aid of churches along the route. One time in Mexico, our bus was stopped by cartel members. They separated some people and let others continue. We paid them the little money that we had to allow us to pass.
12. My daughter and I entered the United States without inspection on or about November 13, 2018 because we did not know that entering at a port of entry was a possibility. When we arrived at the U.S.-Mexican border we saw others crossing the river and figured this was what we should do. Once we crossed, we waited for immigration officials to find us.

When we were apprehended, we told the officers that we were afraid of returning to our home country of El Salvador. We were detained for a short period in the Laredo Detention Center and we are now detained at the Rolling Plains Correctional Facility. I have not yet had a credible fear interview.

13. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, however, I am facing a difficult situation. I cannot go back to my country because my life is in danger there for the reasons discussed above.
14. We needed to reach the United States to ask for protection because there is no other way for us to seek safety from the violence and threats we faced in El Salvador.
15. I hope that through this case, my daughter and I are able to present our applications for asylum. I am committed to this case, but because I am afraid of being harmed in my country, I ask that our name not be included in public documents. I fear that if my name is publicized, my daughter and I will be placed in great danger. I could not forgive myself if something happened.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by Pilar Ferguson.

Executed on December 11, 2018, in the city of Haskell, Texas.

[redacted]
Signature

Certificate of Translation

I, Pilar Ferguson, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on December 11, 2018.

Signature

12/11/2018
Date

EXHIBIT J

DECLARATION OF P [redacted] R [redacted]

I, P [redacted] R [redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born on January 25, 1998, in [redacted] El Salvador. I have lived with my mother, [redacted], in [redacted] since I was born. I fled El Salvador with my mother about two months ago because I fear for our lives.
2. I had to flee El Salvador on or about September [redacted], 2018, after my mother and I suffered violent abuse and death threats from members of the [redacted] political party and the Salvadoran police.
3. I joined [redacted] in January 2016. I had various responsibilities, including conducting censuses in various towns and posting campaign information for [redacted] candidates in these towns.
4. In 2017, I witnessed a [redacted] party leader falsify papers related to the February 2019 presidential election. I refused to help commit election fraud. After that, my mother and I began receiving threats. The threats mainly came from leaders of the municipality and the party.
5. On September [redacted] 2018, my mother and I did not attend a party meeting that we were supposed to attend. The following day, we received a threatening phone call. The person on the other end of the line called us “perras” and told us that we were alone and that no one would protect us.

6. On September [redacted] 2018, five uniformed police officers showed up at our home and beat us badly. They shouted at us. Once they finished beating us, they went outside and shot at our house with guns. They then doused it in gasoline and lit it on fire. As the house began to catch on fire, we managed to escape through the back door. I had to help my mother climb over the fence since her leg was badly injured.
7. We still have bruises all over our bodies from this beating. I have a lot of pain in my back and my mother has bruising and pain in her leg.
8. We did not report the abuse to the police because the police attacked us. The party has bought the police and controls them. They use the police to keep people quiet and the police turn the other way when the party hurts someone.
9. If I went back to El Salvador, I know that [redacted] would kill us. I know this because in August 2018 they murdered the daughter of a family friend who also tried to leave the party. This party member and his wife also fled the country.
10. My mother and I did not want to leave El Salvador. I was studying [redacted] and I only had two years of school left. We also had to leave without any of our possessions. All we had were the clothes on our backs.
11. We traveled through Guatemala and Mexico from September 15 to November 13. We traveled by car and bus. The journey was very difficult. We ran out of money and relied on the aid of churches along the route. One time in Mexico, our bus was stopped by cartel members. They separated some people and let others continue. We paid them the little money that we had to allow us to pass.
12. My mother and I entered the United States without inspection on or about November 13, 2018, because we did not know that entering at a port of entry was a possibility. When

we arrived at the U.S.-Mexican border we saw others crossing the river and figured this was what we should do. Once we crossed, we waited for immigration officials to find us. When we were apprehended, we told the officers that we were afraid of returning to our home country of El Salvador. We were detained for a short period in the Laredo Detention Center and we are now detained at the Rolling Plains Correctional Facility.

13. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, however, I am facing a difficult situation. I cannot go back to my country because my life is in danger there for the reasons discussed above.
14. We needed to reach the United States to ask for protection because there is no other way for us to seek safety from the violence and threats we faced in El Salvador.
15. I hope that through this case, my mother and I are able to present our applications for asylum. I am committed to this case, but because I am afraid of being harmed in my country, I ask that our name not be included in public documents. I fear that if my name is publicized, my mother and I will be placed in great danger. I could not forgive myself if something happened.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by Pilar Ferguson.

Executed on December 11, 2018, in the city of Haskell, Texas.

[redacted]
Signature

Certificate of Translation

I, Pilar Ferguson, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on December 11, 2018.

Signature

12/11/2018
Date

EXHIBIT K

DECLARATION OF G [redacted] R [redacted]

I, G [redacted] R [redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born on [redacted] 2000, in [redacted] Nicaragua. Before coming to the United States, I lived in [redacted] Nicaragua, with my cousin. I fled Nicaragua about one and a half months ago because I fear for my life.
2. I fled Nicaragua at the end of October 2018 with my sister-in-law and nephew after I received persistent death threats.
3. In January 2018, I began studying medicine at [redacted] in [redacted], Nicaragua.
4. In April 2018, protests began in Nicaraguan cities regarding policy reforms announced by the president. When the protests began, , I joined a group of other medical students to help those injured in the marches by government soldiers. The government prohibits public hospitals from helping people injured in marches and protests. Our group was easily recognizable as medical volunteers because our clothes indicated that we provide medical services.
5. I also participated in about six marches in April, May, and June 2018 in [redacted]. The paramilitary was present at all of these marches.
6. In June 2018, I received several threatening phone calls. The callers told me that they know who I am and that they would take me to prison. I changed my phone number because I felt unsafe.
7. Soon after, I relocated to [redacted], where my parents live. I participated in marches there, as did my parents.

8. I returned to [redacted] in August 2018 because school was starting again. At that time there was a much stronger paramilitary presence in [redacted] than when I left. In mid-August, the threats started again.
9. In October 2018, I was approached by police officers. They stopped their car next to where I was walking on the street. They asked me if my name was [redacted] and I denied that it is. They told me that the next time they saw me, they would take me into custody. I was scared that the police would take me to [redacted] prison, where I would be tortured and raped. There are many political prisoners in that prison. I fled Nicaragua at the end of October.
10. The decision to leave Nicaragua was a difficult one. My parents and siblings are back in Nicaragua. I am concerned for them because they also participate in marches. One of my siblings studies at the same university where I studied and participates in marches. I also had to borrow money from my parents to make the journey to the United States.
11. If I went back to Nicaragua, I know the government would find me and imprison me. I know this because the government hates students since they were the first ones to rise up and protest. I also know this because the Nicaraguan prisons are filled with political prisoners.
12. I entered the United States without inspection on or about November 13, 2018, because I heard that the United States was not letting many people through the port of entry. When I was apprehended, I told the officers that I was afraid and that I wanted to seek asylum.
13. I had a credible fear interview on or about December 5, 2018. I now await a decision.
14. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, however, I am facing a difficult situation. I

cannot go back to my country because my life is in danger there for the reasons discussed above.

15. I needed to reach the United States to ask for protection because there is no other way for me to seek safety from the violence and threats I faced in Nicaragua.
16. I hope that through this case, I can present my application for asylum. I am committed to this case, but because I am afraid of being harmed in my country, I ask that my name not be included in public documents. I fear that if my name is publicized, I will be placed in great danger. I could not forgive myself if something happened.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by Pilar Ferguson.

Executed on December 11, 2018, in the city of Haskell, Texas.

[redacted]
Signature

Certificate of Translation

I, Pilar Ferguson, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on December 11, 2018.

Pilar Ferguson
Signature

12/11/2018
Date

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, on behalf of themselves and all others similarly situated *Plaintiffs*, v. DONALD J. TRUMP, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-2718-RDM [Consolidated with Civil Action No. 18-cv-2838-RDM]

DECLARATION OF ANA C. REYES

I, Ana C. Reyes, declare as follows:

1. I am a partner with the law firm of Williams & Connolly LLP, where I also serve on the firm's Executive Committee and as the co-chair of its International Litigation practice. Williams & Connolly is co-counsel for the Plaintiffs in this action. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment and Class Certification.

2. Williams & Connolly, founded in 1967, has more than 300 lawyers, all based in Washington, D.C. The firm provides litigation and other legal services to clients nationally and internationally, focusing on complex litigation in a wide variety of areas, including complex civil litigation and class actions. Representation of asylum seekers and organizations devoted to protecting the rights of asylum seekers, an effort that I have led since 2003, has been and continues to be one of the primary areas of focus of Williams & Connolly's pro bono practice. The firm has represented a substantial number of asylum seekers at all levels of the asylum process, from interviews before asylum officers to hearings in immigration court, and to appeals

before the Board of Immigration Appeals, the U.S. courts of appeals, and the U.S. Supreme Court.

3. I am a 2000 graduate of Harvard Law School. I have been licensed to practice law since 2001 and have been a partner at Williams & Connolly since 2009. I also hold a Master's in International Public Policy degree from Johns Hopkins University, which I was awarded in 2014. In addition to my work on asylum matters, my practice is focused on complex litigation at the trial and appellate levels and international arbitration. I have been nationally recognized for my asylum work and my trial work. I have successfully represented over a dozen individuals and families seeking asylum. I have also represented in appellate courts throughout the United States and in the United States Supreme Court groups dedicated to the rights of refugees, including the United Nations High Commissioner for Refugees and Center for Gender & Refugee Studies. I currently sit on the advisory board of the Center for Gender & Refugee Studies.

4. The Williams & Connolly lawyers also involved in representing Plaintiffs include Thomas G. Hentoff, Ellen E. Oberwetter, and Mary Beth Hickcox-Howard.

5. Mr. Hentoff is a partner at Williams & Connolly LLP. He is a 1991 graduate of Columbia Law School. He has been licensed to practice law since 1992 and has been a partner at Williams & Connolly since 2000. He has served as chair of the firm's Pro Bono Committee since 2005 and has represented many clients in pro bono litigation against the federal government and has led a number of pro bono cases on behalf of immigrant plaintiffs. He served on the D.C. Bar Pro Bono Committee from 2006 to 2012. Mr. Hentoff's practice also focuses on media law, intellectual property disputes, and other complex civil litigation at the trial and appellate levels, including consumer class action litigation.

6. Ms. Oberwetter is a partner at Williams & Connolly. She is a 2000 graduate of the University of Texas Law School. She has been licensed to practice law since 2000 and has been a partner at Williams & Connolly since 2009. She has worked on numerous pro bono matters and supervised the firm's parole revocation pro bono program from 2010 to 2015. Ms. Oberwetter's practice focuses on complex civil and criminal litigation at the trial and appellate levels, including the defense of professional malpractice claims, litigation related to bankruptcy matters, and patent and licensing disputes. She has represented a professional malpractice defendant in a class action.

7. Ms. Hickcox-Howard is a senior associate at Williams & Connolly. She is a 2008 graduate of the University of Texas Law School. She has been licensed to practice law since 2011. Ms. Hickcox-Howard's practice focuses on complex civil litigation at the trial and appellate level, including financial fraud, trade secrets, and class actions. Her class action experience includes representing defendants in state and federal class actions in a variety of areas, including employment and consumer class actions. She has handled a number of pro bono matters including representing immigrant plaintiffs in civil rights cases.

8. Mr. Hentoff, Ms. Oberwetter, Ms. Hickcox-Howard, other members of Williams & Connolly's litigation team, and I have been involved in the investigation and preparation of this lawsuit including developing the facts and legal arguments, and drafting the complaints and briefing.

9. Williams & Connolly is committed to representing zealously the Plaintiffs and the class whom they seek to represent, including devoting all resources needed for the effort.

10. Williams & Connolly is representing Plaintiffs on a pro bono basis. The firm is not receiving reimbursement from the individual plaintiffs or from other members of the proposed class, nor to my knowledge is co-counsel.

11. Attached hereto as Exhibit 1 in support of Plaintiffs' Motion for Summary Judgment and Class Certification is a transcript from the Court's December 17, 2018 hearing on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

I declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, memory, and belief.

Executed on the 4th of January, 2019, by Ana C. Reyes.

/s/ Ana C. Reyes

Ana C. Reyes
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., et al.,

Plaintiffs, **Civil Action No. 1:18-cv-2718**

vs.

DONALD J. TRUMP, et al.,

Defendants.

S.M.S.R., et al.,

Plaintiffs, **Civil Action No. 1:18-cv-2838**

vs.

DONALD J. TRUMP, et al.,

Defendants.

Washington, DC
December 17, 2018

10:13 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE RANDOLPH D. MOSS
UNITED STATES DISTRICT JUDGE

Reported By: **JEFF M. HOOK**
Official Court Reporter
U.S. District & Bankruptcy Courts
333 Constitution Avenue, NW
Room 4700-C
Washington, DC 20001

APPEARANCES:

For the Plaintiffs:

ANA REYES
ELLEN OBERWETTER
Williams & Connolly
725 12th Street, NW
Washington, DC 20005

MITCHELL REICH
Hogan Lovells
555 Thirteenth Street, NW
Washington, DC 20004

For the Defendants:

SCOTT STEWART
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

P R O C E E D I N G S

DEPUTY CLERK: Civil actions 18-2718 and 18-2838, O.A., et al., versus Donald J. Trump, et al.; and S.M.S.R., et al., versus Donald J. Trump, et al.

Will counsel please approach the podium and identify yourselves for the record.

MS. REYES: Good morning, your Honor. Ana Reyes of Williams & Connolly for the O.A. plaintiffs.

THE COURT: Good morning.

MR. REICH: Good morning, your Honor. Mitchell Reich of Hogan Lovells for the S.M.S.R. plaintiffs.

THE COURT: Good morning.

MR. STEWART: Good morning, your Honor. Scott Stewart of the Department of Justice for all the defendants in both cases.

THE COURT: Good morning, Mr. Stewart.

All right, Ms. Reyes, do you want to start things off?

MS. REYES: Yes, your Honor. Good morning, and may it please the Court.

THE COURT: Good morning.

MS. REYES: My name is Ana Reyes of Williams & Connolly, and we represent the O.A. plaintiffs. Hogan Lovells is here today on behalf of the S.M.S.R. plaintiffs, and Mr. Reich will be arguing for them.

With the Court's permission, we have coordinated amongst ourselves and we would propose that we split the time evenly for both opening and rebuttal between the two plaintiffs' groups.

THE COURT: You're welcome to do so.

MS. REYES: Okay, thank you.

THE COURT: Let me just ask one process related question at the beginning. Do any of the plaintiffs dispute the Government's factual assertions with respect to when the regulation was transmitted to the office of the Federal Register? And the reason -- I can tell you the reason I've raised that is because one of the declarants is somebody who is a friend of mine, and I would have to consider whether I have a recusal issue if there's a factual dispute on that question.

MS. REYES: I don't believe there is, but let me just turn my head real quickly.

THE COURT: Okay.

MS. REYES: We're good, your Honor.

THE COURT: Okay, fine.

MS. REYES: I knew I was not the expert, so I needed to get the expert on that.

THE COURT: Always good to have the expert.

MS. REYES: Yep. I have to tell you that was a curveball, I was not expecting that one.

THE COURT: You were not expecting that as --

MS. REYES: That was not in the --

THE COURT: -- the first question, okay.

MS. REYES: Yes. Your Honor, plaintiffs in both cases ask this Court to enjoin an illegal rule, one that the Government hastily issued. The rule that entering the United States through Mexico outside of a port of entry disqualifies someone automatically for asylum is contrary to statute. It violates 8 U.S.C. 1158(a) of the Immigration and Nationality Act in which Congress expressly legislated that any alien may apply for asylum whether or not they entered at a port of entry.

And since Congress amended 1158(a) to bring the United States into conformance with our international treaty obligations, it's no surprise that the rule also violates those obligations. Article 31 of the 1967 Refugee Convention mandates that states shall not penalize refugees for their manner of entry which is precisely what this rule does.

Now, your Honor, that is our merits argument in a very brief summary fashion. But of course there are a lot of legal and other subsidiary issues. And we coordinated with the Hogan Lovells team in advance of the argument as to how we would split them, and we propose to do the following which is I will handle the main 1158(a)(1) argument and --

that the rule violates our treaty obligations. If the Court has any questions on 1225, I can answer those.

Mr. Reich will handle arguments that the rule violates the APA both because it was issued without notice and comment, and because it is arbitrary and capricious. He will also argue that the rule exceeds the Attorney General's rulemaking authority under 1158(b)(2).

Now, unfortunately on jurisdiction and the TRO factors, it's not as simple to break things up. So we propose the following which is that we will take the lead on the jurisdiction issues. Ms. Oberwetter will address jurisdictional issues first for the O.A. plaintiffs, and then Mr. Reich will be available for any questions or argument relating to his side of plaintiffs. And then we'll flip it for the TRO factors. Mr. Reich will argue first on general issues for the plaintiffs, and then Ms. Oberwetter will answer any questions that you might have on that.

THE COURT: Okay.

MS. REYES: And your Honor, we are happy to do this however you and the Government would like. We can do it issue by issue or we can argue the plaintiffs all at once and then the Government argues all at once.

THE COURT: I think it probably would help me in thinking things through if we do jurisdiction first --

MS. REYES: Sure.

THE COURT: -- on both sides, and then do substance on both sides after that.

MS. REYES: Sure. So I will sit down and let the expert, Ms. Oberwetter, get up.

THE COURT: Okay, good, thank you.

MS. OBERWETTER: Good morning, your Honor. May is please the Court, Ellen Oberwetter from Williams & Connolly.

THE COURT: Good morning.

MS. OBERWETTER: At the outset, I'm happy to either take questions or I have some sort of high level principles that I think we can walk through to set out our arguments on jurisdiction. And I will note, and Ms. Reyes just addressed it, that Mr. Reich will have some comments speaking from the perspective of their case on jurisdiction after I am done with my remarks.

First principles, federal question jurisdiction is appropriate here under 1331. If we start at the very beginning, the types of issues that we're raising are core questions of federal jurisdiction under the APA; that there are violations of statute, that there's an embedded constitutional issue, et cetera. The question really is, then, is there something that takes that away.

THE COURT: Let me ask you just before you get to that, are the plaintiffs affirmatively relying on 8 U.S.C. section 1252(e) as a grant of jurisdiction in this Court or

are you just relying on 1331?

MS. OBERWETTER: So at the start, we believe that all of the plaintiffs' claims on all of the issues are covered and encompassed by 1331, that there's appropriate federal question jurisdiction. We realize, then, that there are questions that the Government has raised about 1252. If any aspect of 1252 applies, we believe there are reasons that as to all of our claims there is still appropriate jurisdiction in this Court.

So it may make sense to talk about -- I'll take my guidance from you, your Honor, but sort of why we think some big picture principles about 1252, the sort of ways to conceptualize the different pieces of the case. And then to walk through why the Government's reasons that 1252 strips this Court of jurisdiction in one form or another do not apply.

THE COURT: Am I right that -- in understanding 1252 that 1252(a)(5) deals with removal proceedings whereas -- as does (b)(9), but that (e) deals with expedited removal?

MS. OBERWETTER: So yes, your Honor. And if you start even -- to an extent. If you start even further up in (a) and you look at (a)(1) and (a)(2), that's sort of a big picture dividing line of what happens to various kinds of removal claims. (a)(1) is about regular removal. (a)(2)

lays out a variety of limitations on claims that relate to expedited removal. And then (a)(2)(iv), to the extent there's something that you think is a procedure or policy adopted by the Attorney General to, quote, implement the provisions of section 1225(b)(1), that would then get routed through (e)(3). I realize that's a little bit --

THE COURT: And 1225(b)(1) is expedited removal, is that correct?

MS. OBERWETTER: 12 -- sorry, yes, that is correct. Yes, your Honor.

THE COURT: Okay.

MS. OBERWETTER: So then when you get down to --

THE COURT: So essentially -- I mean, just the big picture, the way it works is that if you're in removal proceedings and you have a legal dispute or a legal question, you go to the Court of Appeals. If you're in expedited removal proceedings and there's an issue, it goes to this Court here, is that right?

MS. OBERWETTER: Sort of. As a big picture dividing point, there's a difference. The statute sets out a difference in the way that regular removal claims are channeled and expedited removal claims are channeled, that is true. The trick, then, is for regular removal claims, what actually are the -- well, for both sets, what are the constraints on when does the channeling effect of this

statute even come into play. Our view is the types of claims that -- with the possible exception of our 1225 expedited removal claim which is count two of our complaint, nothing needs to run through 1252 --

THE COURT: Oh yeah, no, I understand that. I'm just trying to get the landscape before we get to this particular dispute, and whether these provisions have anything to do with it. But just as a general matter, just making sure I'm understanding the usual processes, is it right that typically at least appeals in removal proceedings go to the courts of appeals?

MS. OBERWETTER: That is correct typically.

THE COURT: And expedited removal goes to the district court, is that right?

MS. OBERWETTER: In expedited removal, there's a lot of jurisdiction stripping that happens where nobody may get to hear certain aspects of the claims --

THE COURT: Right.

MS. OBERWETTER: -- unless they get funneled through (e)(3) or certain other provisions apply.

THE COURT: Okay, that's helpful. Okay, thanks.

MS. OBERWETTER: So I think in the big -- a couple of big picture points. So that in broad contours outlines that 1252 -- which is titled Judicial Review of Orders of Removal and really is targeted to questions directly

pertaining to removal. A couple of big picture points as follows.

The first is there really are two halves to the rule that we're talking about in this case. There is what I think of as part one of the rule which says -- which sets out a mandatory bar to asylum, and deems certain people if they cross in violation of a presidential proclamation ineligible for asylum.

In our view, that is not a removal related issue writ large. That is an issue that arises under the asylum statute, and is not one that especially implicates 1252. And I can talk about that in more detail.

THE COURT: Right. And I take it your point on that is that asylum is not about removal, it's about your right to stay --

MS. OBERWETTER: Exactly.

THE COURT: -- and your path to citizenship?

MS. OBERWETTER: Yes, your Honor.

THE COURT: Okay.

MS. OBERWETTER: Yes, your Honor. And then big picture point number two, it has to do with who our various plaintiffs are and what different postures that they're in right now. There's a little bit of a dust up in the briefing I think about what posture people are in at various points in time; are they in expedited removal right now or

are they in regular removal right now. We have an unaccompanied minor -- that's our plaintiff G.Z., who will go through regular removal processes at some point. But each of them raise slightly different issues from a jurisdictional standpoint if you think you're in the world of 1252.

But from our standpoint, all of them have a right wholly apart from 1252 to challenge what I just described as part one of the rule which is this taking away of their eligibility for asylum.

THE COURT: Right. And I suppose a further question that I don't think is in the briefing as I recall it at least is that the Government responds and says well, they're now -- at least some of the plaintiffs are now in full fledged removal proceedings, and therefore the channeling provisions apply. And in any event, there's not the same injury and so forth. And I know that part of the response to that is to say well, they're there because of the Ninth Circuit decision, and who knows what's going to happen with the Ninth Circuit decision.

I suppose the other question I have -- and I can ask this to the Government as well, is just typically the law is that the Government can't moot a case except with very limited exceptions -- or the courts are certainly cautious when the Government -- when a suit is properly

brought and there's jurisdiction, and the Government comes in and then takes some action in order to arguably cut the legs out from underneath the plaintiff. But it's not a permanent -- necessarily a permanent action that's going to last forever.

And I suppose one question I'll have for the Government is whether in fact they're committed with respect to the plaintiffs to give them the sort of preexisting rights that they may have had without the executive order or whether depending on whatever happens in the Ninth Circuit and the Supreme Court or otherwise, that could change at some point in time.

MS. OBERWETTER: That's right, your Honor. I mean, I suppose we may have a question at some point about whether there are efforts taken to moot these plaintiffs' cases. I don't think that it's happened to our plaintiffs at this point. I know Mr. Reich is going to talk about that from his standpoint as well, as well as the question of overlapping injunctions.

THE COURT: And that's because the notice is -- in your view, the notices are defective?

MS. OBERWETTER: Well, in part, your Honor. Regardless of what happens with the procedural posture and expedited removal, et cetera, they still have been currently deprived of eligibility for asylum. That's the position the

Government is taking. Nothing happens to that claim almost -- unless they're ultimately granted asylum I suppose, and then we will cross that mootness bridge when we come to it. They've been deprived of the right to seek and obtain asylum.

THE COURT: What about -- putting aside -- I mean, accepting your argument that 1285 -- I'm sorry, 1252 doesn't affirmatively divest the Court of jurisdiction, is there just a further problem that under the APA, that there's not -- that review is not available where there is an alternative statute that provides review? And even if 1252 doesn't -- isn't necessarily exclusive or doesn't on its face bar the claims, that as long as there is some way to raise the claims that the APA doesn't provide a basis for seeking relief?

MS. OBERWETTER: I think a couple of answers to that, your Honor, as follows. The first is we're obviously -- our claims are not structured purely under the APA. We're also saying that the Government's action is unlawful on its face, and you don't fully need to go through the APA for that kind of a challenge. In which case, I think that issue would not be a concern.

In addition to that, it's not clear -- let's just take A.Z.'s case for example and expedited removal. She's not going to have -- there is no other posture for her that

we can think of at this moment for her to bring this kind of claim that would be channeled other -- that needs to be channeled through -- if it's going to be channeled through (e)(3), she's got nowhere else to go if you're in the rubric of 1252 to start with.

For the individuals in -- who may be in regular removal -- and our position is that they are not currently presently properly in regular removal. And I don't know how exactly the Government will characterize their status this morning. 1252 does not require them to wait. 1252, and including (b)(9) which is the provision we're talking about, should allow them to resolve the question of eligibility for asylum.

And I will add it's not at all clear to me -- and I don't think either an asylum officer or an immigration judge would be able to strike down the rule. I think the way to get relief on that question is to be here in a court like this.

THE COURT: Right. Although, I mean, I suppose there could be something in the nature of just an exhaustion question with respect to at least the individual plaintiffs, and that they may well get asylum depending on what the Government does. And if they do get asylum, there's never an issue for the Court of Appeals as to whether, as to them at least, the bar on their ability to apply is lawful or

not.

MS. OBERWETTER: Putting aside, your Honor, the question of the existing order that is in California right now --

THE COURT: Right.

MS. OBERWETTER: -- I don't think there is much question today that the Government intends to apply the rule against our clients; and that this is -- this here in this posture is the way to challenge that.

THE COURT: Okay. Do you want to address the California litigation and how that implicates all of this?

MS. OBERWETTER: I am going to --

THE COURT: You're going to defer.

MS. OBERWETTER: -- let Mr. Reich take the lead on that particular point.

THE COURT: Okay, that's fine.

MS. OBERWETTER: If it would be helpful to you, I'm happy to address in a little bit more detail the Government's arguments as to why they believe jurisdiction doesn't exist here. If you're satisfied with that, I don't --

THE COURT: Yeah, no, I'm happy to hear more about that if --

MS. OBERWETTER: Okay.

THE COURT: -- you have more to say.

MS. OBERWETTER: So I'll start with the first provision that they cite, as you noted and you started with, is (a)(5) which we believe on its face does not apply because it relates to, quote, orders of removal. We don't believe that is where we are at this point. This is a challenge to the rule itself as opposed to any sort of appeal from an order of removal at this juncture.

I will note further that under (a)(5), it also says except as provided in subsection (e). So with respect to A.V.'s claims, (a)(5) is no answer. Because even if you're in the world of looking at 1252 for our plaintiff whose name is A.V. for present purposes, you go to (e)(3) and jurisdiction is not removed from this Court.

THE COURT: Is A.V. -- well, tell me why is A.V. the one that's not in the expedited -- I mean in the removal proceedings?

MS. OBERWETTER: So A.V. is the one -- A.V. is currently undergoing -- as I understand it to date is being charged criminally --

THE COURT: Yes.

MS. OBERWETTER: -- for unlawfully crossing the border. And the Government has taken various positions in their brief whether she is actually in expedited removal. At a minimum, they have conceded in their briefing that she is imminently in expedited removal. So according to

everything we know now, there's not much question that that's the portion of the system she's going to be exposed to is expedited removal.

So it's possible to put her claims in a little bit of a different boat in terms of thinking about 1252, because she's going through the separate part of the process --

THE COURT: Okay, okay.

MS. OBERWETTER: -- from ordinary removal.

THE COURT: But I take it it's also your concern that if the Ninth Circuit's decision were set aside or if Judge Tigar's decision were set aside -- or not continued, because I guess he's going to have a hearing on the 19th, but that your other clients then could find themselves in expedited removal, is that right?

MS. OBERWETTER: I would have to think about what that would mean for the prospect of them going to expedited removal or whether they might still stay in the regular --

THE COURT: I see, okay.

MS. OBERWETTER: -- removal process. I'm not sure that it depends on what happens to the Ninth Circuit -- out in the Ninth Circuit in that regard. But even for the individuals who are in regular removal under (b)(9), we don't think that they are -- this is the type of claim that they are obligated to go through the removal process before they bring.

The language of (b)(9) has been the subject of a fair amount of briefing in the parties' briefs. And the ultimate question under (b)(9) is whether there is a question of law or fact that, quote, arises from an action taken or proceeding brought to remove an alien from the United States under this sub chapter.

So to go back to first principles for a minute, the core of what we are here challenging is an additional limitation and condition on asylum which is apart from issues in removal. And I will add, the Government goes to a lot of lengths in its brief to try to state the test as is it removal related. That's the language they use in their brief. That's not what the language of the statute says.

They cite a number of cases, all of which sort of highlight this distinction. So for example, the J.E.F.M. case, the Vetcher case, things like that that they cite in their briefs which really go to the core of removal processes: Are you entitled to an attorney in removal; are you entitled to access to a law library in removal. That is not the kind of claim that we are fundamentally bringing here about a change in eligibility for asylum.

The Jennings case that we cited -- it's a Supreme Court plurality opinion from earlier this year, I think also is very supportive of the position that we're taking on this issue. And the questions that the Jennings court -- the

questions that the Jennings court laid out were sort of three-part. And it's a plurality opinion.

But they said in Jennings (b)(9) was not applicable because the plaintiffs, quote, weren't asking for a review of an order of removal. They weren't challenging a decision to detain the individual in the first place, and they weren't challenging any part of the process by which their removability will be determined.

And with respect to part one of the rule, that part of the rule is not a part of the process by which their removability will be determined. It goes to the underlying asylum; their entitlement to asylum rather than removal.

THE COURT: So as I understand it, if you're at the border and you apply for asylum, you do so in the context then of a removal proceeding, is that correct?

MS. OBERWETTER: If you are --

THE COURT: Let me put the question a little more generally. Are there ways to apply for asylum where you're not in some type of either removal or expedited removal proceeding?

MS. OBERWETTER: Yes, your Honor, there are ways to affirmatively apply for asylum. And -- yes. The short answer to that is you don't have to be in removal proceedings in this country to apply for asylum in the first instance, yes.

THE COURT: That's just the general asylum provision?

MS. OBERWETTER: I believe that's correct, your Honor. And I can try to find a cite for that. But yes, you can affirmatively apply for asylum.

THE COURT: Okay. You can just show up not in removal and say, "I'm here and I'd like to apply for asylum in this country." And then who decides whether you're entitled to asylum then under those circumstances? Is it an immigration judge and is -- how does that work then?

MS. OBERWETTER: I would need to consult a few more of the provisions on that to answer that question.

THE COURT: Okay.

MS. OBERWETTER: But yes, there's a form you fill out to apply for asylum that you can make an affirmative application for asylum, yes.

THE COURT: Maybe one of the others or someone can --

MS. OBERWETTER: Yes.

THE COURT: -- let me know at some point just whether -- just who makes those decisions.

MS. OBERWETTER: Yes. Thank you. In the first instance, it would be an asylum officer reviewable by an immigration judge.

THE COURT: Okay, thank you.

MS. OBERWETTER: There was -- once you get past (b)(9), there was an additional argument that the Government made with respect to whether 1252(f) would bar the type of claim at issue here. We don't believe that it -- we don't believe that that section is applicable at all. That part of the statute is about challenges to implementation of the statute in the first instance. And it also relates to authority to enjoin or restrain the operation of the provisions of, quote, part four of this sub chapter. And the asylum statute itself is not part of part four. So from our standpoint, 1252(f) simply does not apply.

THE COURT: So that's about enjoining a provision of the statute itself versus enjoining the exercise of some authority delegated to the Attorney General under the statute, is that --

MS. OBERWETTER: That's correct.

THE COURT: -- the distinction?

MS. OBERWETTER: That's correct, your Honor, it speaks specifically to statutes.

THE COURT: Okay.

MS. OBERWETTER: So the bottom line from our standpoint is you don't really need to get into 1252 at all. It doesn't strip jurisdiction from this Court with the possible exception of A.V.'s count two which is her specific challenge to how the expedited removal challenge --

expedited removal statute or rules would operate post the rule. That's the only thing that we think necessarily has to even be funneled through -- has to be funneled through (e)(3).

For everything else, we don't think 1252 is necessary or part of what the Court needs to hinge its jurisdictional authority on.

THE COURT: Okay. Anything further?

MS. OBERWETTER: Not on jurisdiction, your Honor.

THE COURT: Okay, that's good, thank you.

MR. REICH: Good morning, your Honor.

THE COURT: Good morning.

MR. REICH: Mitchell Reich for the S.R.S.M. [sic] plaintiffs. I think I'll just start by building on the discussion you had with Ms. Oberwetter. We have two sets of plaintiffs. One, individual plaintiffs who are somewhat similarly situated to the O.A. plaintiffs; persons who were fleeing death threats and gang violence in Honduras and sought asylum here. And then we have a separate set of plaintiffs, two pro bono legal services organizations, that provide assistance to individuals in detention centers waiting to press their asylum claims.

And I think the jurisdictional questions are somewhat different for both, and so I'll start with what Ms. Oberwetter was just talking about. And I think she very

ably laid out the -- our shared position on that. And I would just add a couple things. I think that in our view, 1252(a)(5) is clearly inapplicable here as a way of stripping jurisdiction, because that only governs review of final orders of removal. And there's no contention such an order has been issued here.

As to (b)(9), I think the easiest way of reading this is that it has two requirements. It has to be a legal question arising out of, and second an action taken or proceeding brought through a movant alien. So neither of those requirements are satisfied here for either of the individual plaintiffs.

First, there's been no action taken or proceeding brought to remove either S.R.S.M. [sic] or her minor child R.S.P.S. And that's because the Government says a proceeding has been brought because notices to appear were issued. We submitted a declaration explaining that S.R.S.M.'s [sic] notice to appear is defective, doesn't have -- list a date or a time. And I'll give a factual update on that in a moment.

But under the Supreme Court decision in Pereira, that is not a notice to appear. It's not just an incomplete notice to appear, it's not a notice to appear at all. So that doesn't initiate proceedings. And I can represent to the Court that R.S.P.S. was issued an identical notice to

appear that also lacks a date and time.

As of this morning, my understanding is that the Government has issued new notices to appear that do list a date and time. And I think that gets to your question about what -- whether it matters what happens after the case is brought. And I think this leads into the second half of the statute which is it's only channeling claims arising out of actions taken or proceedings brought to initiate removal.

Our claims were brought as a factual and temporal matter before removal proceedings had ever been initiated. And the fact that the Government has purportedly to my understanding initiated them weeks after the suit was filed is as clear an indication you need that these proceedings -- that these claims are in no way arising out of removal. And then as a legal matter, for the reasons Ms. Oberwetter said, asylum claims are not bound up in removal. They're claims that can be brought entirely outside of the removal scheme.

And so for that reason too, we think it stretches the statute way too broadly to try to cram them into it as the Supreme Court said in Jennings.

THE COURT: Okay.

MR. REICH: As to the organizational plaintiffs, we have -- Judge Bybee in his opinion considered two very similar -- several very similar plaintiffs. And the Government has no argument that the Court lacks jurisdiction

over the organizational plaintiffs due to 1252. That only governs claims brought by aliens.

So the only jurisdictional argument they have there is a justiciability argument that the organizations lack standing. And I think under the Supreme Court's and the D.C. Circuit's organizational standing precedents, we easily surmount the bar. We have declarations from both the CAIR Coalition and RAICES explaining the way that this rule, if implemented, is going to dramatically curtail their ability to fulfill their mission which is to assist individuals seeking asylum in avoiding deportation. And that's true for a number of reasons that I can get into.

But at a high level, this is going to make it dramatically harder to assist those aliens in preparing for interviews. They now need to prepare for a higher reasonable screening process, then credible -- reasonable fear screening process, then a credible fear process. They're going to need to sort aliens down to two groups, the ones who entered at a port of entry and the ones who didn't. They're going to need to put lawyers in the interviews to assist them in their reasonable fear interviews, because they're much more complicated.

And children who previously could be brought -- get asylum claims as derivatives, now because they're subject to the withholding of removal process are going to

need to be counseled separately. And children are very challenging clients to assist in this process, so that's going to be more resource intensive.

So these organizations have estimated this may cut in half the number of persons they can serve. That's going to be a resource problem for them, and that's going to be a problem in fulfilling their ultimate mission. So I think that clearly fulfills the injury-in-fact requirement that any organizational plaintiff with standing precedence has ever set.

THE COURT: What do you say to -- in response to the Government's contention that that argument proves too much, because if that's right, anytime a rule is adopted that makes it harder to bring a claim, that any type of legal services organization would have standing to challenge that rule?

MR. REICH: Well, I think they're conflating two different concepts. I think that what the precedents say is that if a -- an organization can, quote, manufacture standing if I say, well, litigating against the very thing that we're complaining about is costing us resources. And that's what all the precedents deciding in that line are talking about.

This is the organizations dealing with the effects of the rule, helping persons who are subject to the rule

avoid the consequences and obtain relief. And I think that the League of Women Voters case of the D.C. Circuit is actually a good analog. There was a challenge to a restriction -- citizenship requirements on voter registration forms. Organizations' mission was to register voters, and in trying to help people comply with that requirement they were harmed because it was much more difficult to register as many voters. They couldn't get them in time by election time.

And so this is a comparable kind of harm. We're just trying to deal with the effects of the rule, not -- the harm arises from dealing with the effects of the rule, not the litigation concerning the rule itself.

THE COURT: And what about the Government's zone of interest argument?

MR. REICH: So I think Judge Bybee addressed this, and I think his reasoning's quite persuasive. First of all, the zone of interest test does not require that a plaintiff be given some statutory cause of action by the statute. It just needs to be arguably within the interests Congress was seeking to protect. And I think in at least two ways we're within those. One is we are trying to effectuate the very goals of the statute which is to assist aliens in seeking asylum. And second is that the statute explicitly contemplates a role for these organizations.

In 1158(d)(4), it requires the Government to refer aliens to these legal services organizations just like ours, and it actually makes that part of the statutory scheme. It says if they are referred and then they still file a frivolous application, that affects their rights. So I think that given the generous nature of the zone of interest test, the fact that we are specifically called out in the statute as persons given a role in it is more than enough to satisfy --

THE COURT: So I took a look at the D.C. Circuit's decision in Federation for American Immigration Reform versus Reno which has some pretty sweeping language in it about the zone of interest test and how it applies in the immigration context. And I was puzzling a little bit about whether that decision has been at least partially abrogated by the Supreme Court's Lexmark decision.

MR. REICH: I do think Lexmark talks about zone of interest in extremely broad language. And I also think the Mashe v. Wesch -- I might be getting the name wrong.

THE COURT: Patchak.

MR. REICH: Yes, Patchak, that's an easier one. I think Patchak also. It was sort of responding to some of the overly restrictive zone of interests approaches that some lower courts were taking saying no, we've emphasized it just arguably needs to be the zone of interest. It's just

generally a general interest served by the statute. It doesn't even need to be an entity that Congress was thinking about as trying to help.

And I'd also say that specific D.C. Circuit case, that was quite factually distinguishable. That was a case where the organization -- it was really kind of akin to competitor standing. It was an organization complaining that we were -- immigrants were coming in, were going to take jobs and were going to take services that would go to other entities. It was not all about an organization that's actually trying to serve immigrants and serve asylum seekers, let alone in a way explicitly contemplated by the statute.

THE COURT: And now what about the Ninth Circuit litigation?

MR. REICH: So I --

THE COURT: And really that's an issue I think that goes perhaps partially to the Article III standing. I think it actually really goes much more to the question of irreparable injury and whether there's a need for an injunction.

MR. REICH: Yes. I don't think this, with candor, is a very meritorious argument, this affects Article III standing at all. The plaintiffs still have an interest in seeing this statute -- this rule enjoined. That TRO is

going to expire in two days. We don't have a right to enforce that TRO. So I think for a whole host of reasons, we clearly still have an interest in this suit and in obtaining this relief.

I think the separate question is does that somehow bar this Court as an equitable matter from issuing its own injunction or give it a reason not to. And I think the answer is no. And I think that's true for a number of reasons. I think the first is what I just mentioned, the TRO's going to expire in two days.

THE COURT: Right, but I'm going to know in two days what happens with that as well.

MR. REICH: I do think you are just as well situated as any judge to continue the relief. And moreover, the Government is working vigorously to stay --

THE COURT: Is that -- I mean, you said I'm as well situated as any judge to continue the relief. Isn't Judge Tigar the one who's actually best situated to sort of do that? I mean, he's issued already a lengthy opinion on the question. The Ninth Circuit has reviewed it. The Ninth Circuit has agreed for the most part with his analysis. There's as I understand it an application in the Supreme Court for a stay.

MR. REICH: Yes.

THE COURT: If that's denied, I would think that

Judge Tigar would be in a pretty good position to act promptly in deciding whether he would continue his relief.

MR. REICH: Yes, well, I think we don't know what's going to happen with the state petition in the Supreme Court. And I'd just point out that the Government's working very hard to end that. That might happen before Wednesday, after Wednesday.

THE COURT: Yeah, I was going to ask you, do we know the timing on that at all?

MR. REICH: So I believe a response was just ordered by today.

THE COURT: Right.

MR. REICH: And so I don't know what the schedule is from here on out, but it may take a few more days at least to rule on it.

THE COURT: Okay.

MR. REICH: But I will note that one of the reasons -- one of the central reasons the Government gives for trying to vacate that stay is it says this suit was brought by the wrong people. It shouldn't have been brought by organizations, it should be brought by -- and they say this I think it's on page four of the application, it should have been brought by aliens subject to the rule itself which is us. So I think with one hand saying get rid of this injunction because it's brought by your own people, on the

other hand saying it can be brought by those people plus the ones that they say are the right ones can't get it because the first injunction is a little perverse.

I think as a more general matter there's still a lot of good equitable reasons for this Court to act even in the presence of the other injunction. Many courts have issued TROs even where there's another nationwide TRO in effect: In Affordable Care Act litigation, in the DACA litigation, in the travel ban litigation. And some of the reasons that's true are, one, we're not protected by -- we don't have a right to enforce that injunction, we're not protected by it. Another is one of the arguments the Government has often given against nationwide injunctions is that it prevents percolation of legal issues.

Here we have different plaintiffs, jurisdiction in different courts, different legal claims that aren't being brought in that proceeding. And allowing these proceedings, which are almost certainly going to be decided in an emergency posture, to be solely litigated in the first case to file and issue an injunction I think would be problematic systemically.

And I'd also note in the -- I believe it's the Warren decision, a 1954 Supreme Court decision that the O.A. plaintiffs cite in their brief. The Supreme Court dealt with a somewhat similar circumstance where a court had said

well, there's already an injunction in effect prohibiting this conduct, so I don't want to -- it would be a useless act to issue separate injunctions. The Supreme Court said that was an abuse of discretion. And they said no, that's not true. Different injunctions -- one reason is you never know who's going to enforce the first injunction. A party might sit on its rights.

And we have people here who are -- who have their own separate claim. And one other reason I think that makes this proceeding especially a good candidate for that is we filed a putative class action on behalf of all individuals who crossed the border illegally after this rule -- the southern border illegally after this rule went into effect. And I think that that's an especially strong case for nationwide relief, something that actually even Justices on the Supreme Court who have been skeptical of nationwide injunctions -- Justice Thomas has pointed out maybe the class action is the right vehicle to do this.

THE COURT: What would be the process for certifying a class?

MR. REICH: So the -- in this posture there's two routes --

THE COURT: I'm not sure it would satisfy Justice Thomas' concern to simply say well, as long as you include the allegation, then you can certify -- you can issue --

MR. REICH: Other than that, but there is a process. And I think there's two routes. One -- and we cite the Rodriguez case in our brief that talks about this. This is actually discussed in Newberg on Class Actions, a lot of treatises. It's quite well-established. We're bringing a 23(b)(2) class, one that's seeking injunctive relief. It's quite common at the preliminary stage, if you have a strong case for a preliminary injunction or a TRO, to either, one, provisionally certify the class or, two, the courts -- some courts just take equitable -- in their equitable discretion, consider the fact that a class was brought as a reason to give permanent relief that covers the whole class.

And the provisional certification would essentially be a quick look at whether the class factors are met here of (a) and (b)(2) which I think there quite clearly are, or at least we have a likely argument that they are. And we could then do full class cert briefing after that, but at least to protect all these individuals.

THE COURT: It's a strange posture to think about an opt out class, because -- I mean, I know this issue's been litigated. But there will be people who are members of the class who have no idea that they're members of the class, and will never have an opportunity to opt out because they actually don't live in the United States. They may not

know that they're going to actually attempt to flee to the United States and seek asylum.

I know that's an issue that's been batted around somewhat in the courts, the question of having class actions that include people where they have no knowledge that they're actually in the class and no ability to opt out. Although -- well, I suppose they would have the ability to opt out in the sense that they could always decline the relief that's provided.

MR. REICH: I think given that this is injunctive relief and this would be giving an alien in this situation everything they could want -- no alien would want to be subject to this rule, I think it's hard to imagine one opting out.

I would add the rule is going to -- the injunction would only apply to them once they enter the country and are presumably in custody. So that I think they could be -- would essentially be --

THE COURT: How quickly could that be teed up then? I mean, you'd have to file a motion for leave to provisionally certify a class.

MR. REICH: Well, I do think that on the equitable route -- which a lot of courts have taken, I think that you wouldn't need to do that. And I'm not sure class cert briefing at this -- in this emergency posture is even

necessary for the provisional certification. But certainly, your Honor, we'd be prepared to brief that as expeditiously as possible, and we could do it in a day or two.

THE COURT: I'll have to take a look at the Supreme Court's decision in Boerne, but it does -- I mean, I know that there are a number of courts out there that have issued these overlapping injunctions. To me, it's still a little bit of a head scratcher of saying well, I have to make a finding that these individuals will suffer irreparable injury if I don't act. And an injunction is an extraordinary act -- or preliminary injunction is an extraordinary act.

I mean, assuming that Judge Tigar on Wednesday just issues a preliminary injunction and the Supreme Court declines to grant a stay, there's nobody -- none of your clients are likely to suffer any injury for quite a while. It may be that there's then a process of full review in the Ninth Circuit and a petition to the Supreme Court, but it could be quite a while before that preliminary injunction would be vacated, if at all.

MR. REICH: Right. I think the best way to look at it is will this rule inflict irreparable injury on us. And put aside when conducting that analysis the actions that have been taken either by courts or by the Government voluntarily not to enforce it. The rule is the legal thing

in effect that we're trying to prevent.

And I actually think that of all the cases the Government cites on this issue, no one has said to my knowledge that there is not irreparable injury or that an injunction is not allowed in this circumstance. They've generally just stayed cases as a matter of discretion.

THE COURT: In the cases where judges have issued these overlapping injunctions, they also have not engaged on this question. They haven't gone through the analysis.

MR. REICH: I'll grant you the analysis is not -- there's an opinion -- it's a court -- one of the district courts in New York that talks about this in the DACA context, a very similar context, that says look, the Government is -- sure, there's an injunction granted by a court in the Ninth Circuit. The Government is bringing that all the way up to the Ninth Circuit and the Supreme Court to enjoin, so I have no confidence these plaintiffs won't suffer irreparable injury.

THE COURT: I mean, I guess one thing that I just want to put out there now for you all to think about and for the Government to think about in this posture is whether the better way to proceed would be to take advantage of the provisions of Rule 57 for expedited resolution of a motion for declaratory judgment or request for declaratory judgment. And just -- I mean, this doesn't strike me as a

case in which factually there's anything really to develop.

And I suppose one question would be is why not just resolve the case on summary judgment on an expedited basis. And that then doesn't -- I don't have to then resolve and you don't have to clear the hurdle of irreparable injury in light of the pending case in California.

And I suppose one thing we might do in thinking about this is actually reconvene either telephonically or in person shortly after Judge Tigar has an opportunity to decide what he's going to do or perhaps shortly after the Supreme Court does whatever it's going to do. And I'd be prepare to do that, you know, on very short notice if need be. So I think that's something worth thinking about.

MR. REICH: We certainly would -- I would need to consult with my -- the co-plaintiffs and co-counsel.

THE COURT: Right.

MR. REICH: One thing I would say is that I think at a minimum what we would think was appropriate here is that if the injunction is stayed or lifted, and that this Court was going to stay its hand until waiting to see what happened, I think we would want a commitment from the Government that it's not going to immediately put the rule into effect until this Court has at least had a chance to rule on our injunction.

THE COURT: Well, I suppose what I would do about that -- and again, this is just thinking out loud, and I'd like to get people's reactions to it is -- I mean, if the Government's willing to consent to something like that, terrific. Alternatively, I'm available. And if the Supreme Court were -- this is all very hypothetical at this point. If the Supreme Court were to issue a decision on Thursday night that said in the decision although we think that there's considerable merit to plaintiffs' challenge in this case, we don't think that organizations should have standing in cases like this. And therefore, we're going to grant the stay pending the filing of a sur petition on those issues.

You know, I could see you within an hour of a decision like that if necessary, and we can decide whether -- at that point in time whether I needed to enter a TRO.

MR. REICH: Right.

THE COURT: Alternatively, if the Supreme Court issues a decision and says that we're going to deny a stay for the reasons given by the Ninth Circuit and it's a thorough and well-reasoned decision, then you may conclude there's not a whole lot of reason for me to do something if the Supreme Court has opined on the relevant issues.

So one thing we might also think about doing is whether -- as I said, whether we need to just reconvene very

shortly after either Judge Tigar or the Supreme Court does something further.

MR. REICH: Yes, I think that makes sense.

THE COURT: Okay. Anything further you wanted to address with respect to standing?

MR. REICH: Not unless your Honor has any further questions.

THE COURT: No, thank you. Let me hear from Mr. Stewart.

So we'll take standing first, but you're welcome to also address some of the irreparable injury issues that we were talking about and some of the process issues that I brought up as well.

MR. STEWART: Yes, your Honor. May it please the Court, before standing could I hit the -- some of the statutory jurisdictional arguments or I could go straight to standing if that would be --

THE COURT: Whatever you prefer.

MR. STEWART: Great. Thank you, your Honor. On the standing point, I'd just emphasize that my understanding of the state of play -- and we can get firmer -- this is a -- things are moving swiftly on this, is that this case involves seven -- or excuse me, eight -- these two cases collectively involve eight individual aliens. Seven notices to appear in removal proceedings have been issued. My

understanding is that for all of those seven, dates and hearing times before immigration judges have now been set. So those -- that's where those proceedings stand. Again, those are moving along.

The point I'd emphasize -- and this is key to the 1252(a)(5), (b)(9) jurisdictional argument, your Honor, is that a central point -- when somebody has issued a notice to prepare -- appear in proceedings under 8 U.S.C. 1229(a), 1229(a), also known as section 240 of the INA, is called removal proceedings. It's a proceeding where a central issue is whether you, the alien, are removable and whether you have any entitlement or ability to get relief or protection from removal. That centrally and frequently and thousands and thousands of times a year calls for a determination of eligibility and being granted asylum.

So the issue of asylum eligibility is going to be central -- a central issue in those claims. And our submission is that under the combined effect of 1252(a)(5) which consolidates matters arising from removal proceedings to judicial review and the courts of appeals and (b)(9), all of those clearly belong in the federal -- in the immigration courts and must be exhausted. And then ultimately there will be -- or there can be, if the individual alien pursues it, judicial review of relevant questions on asylum eligibility in the Court of Appeals.

THE COURT: For example, in each of those seven cases, if the immigration judge were to grant withholding of removal, would the aliens in those cases have a way to challenge the denial of asylum?

MR. STEWART: In their ultimate petitions for review, your Honor, or in front of the Board of Immigration Appeals itself.

THE COURT: But they can go to the Court of Appeals -- even if there's not an order of removal, they can go to the Court of Appeals?

MR. STEWART: That's right, your Honor. The way it works is that -- and there's a suggestion to the contrary in one of the reply briefs. But what happens is if you have a final order of removal, withholding of removal or protection from removal under the Convention against Torture, that's a form of relief from that final order of removal. So you can seek review of that final order of removal. It's a question -- you know, aside from that --

THE COURT: I see, I get it. So you're under an order of removal, but it's suspended in light of --

MR. STEWART: Right.

THE COURT: -- withholding of removal or the CAT issue?

MR. STEWART: Right, your Honor. So and so is ordered removed to country X, but their removal to that

country is withheld because of these reasons or they're protected from removal because of these reasons.

THE COURT: Right. What about the plaintiffs' argument that says how can it possibly be that our claims arise from the removal process when we brought them before there were any removal proceedings?

MR. STEWART: Your Honor, I guess a few things. One is that -- if I can focus on the language of 1252(b)(9): Arising from any action taken or proceeding brought to remove an alien from the United States. Once a notice to appear has been filed, then under 8 C.F.R. 208.2B, once a notice to appear issues, asylum claims must be adjudicated in those proceedings. Defensive asylum applications are frequent, they're the norm.

There are some circumstances in which somebody can affirmatively apply for asylum. That's not really the relevant category for these individual plaintiffs. They entered unlawfully or were apprehended and then went that route. So it's still -- as the Ninth Circuit said in the J.E.F.M. case, you know, removal related activity. Nothing's more central to that than a removal proceeding under section 240 of the INA.

THE COURT: And what about the one plaintiff who was actually in an expedited removal or was potentially in an expedited removal proceeding?

MR. STEWART: Sure, your Honor. So the central point there is that we don't know what's going to happen to that plaintiff and any -- kind of where that plaintiff is going to end up is speculative at this point. We do know that that person is potentially subject to expedited removal proceedings. It's possible, however, that they could just be issued a notice to appear in section 240 proceedings and that will be the route they go. We just don't know yet, we need to see where that heads.

If that person goes into section 240 proceedings, they'll fall in the same bucket as every -- the same category as the other plaintiffs here. If they go into expedited removal proceedings, then they can seek certain paths to review with an immigration judge or in a systemic challenge in this tribunal. But right here we just don't -- there's no determination that would authorize them to bring that kind of a challenge. It's speculative downstream and in the future.

And in kind of a related theme, that's sort of some of the key points about the individual plaintiffs, your Honor.

THE COURT: Well, is it -- I mean, if that person is not in removal proceedings or in expedited removal proceedings, why is it that person then couldn't simply apply for asylum except for the fact that this law precludes

that person from applying for asylum? I mean, because I assume you would agree with the assertion that was made earlier to me is that there are mechanisms to apply for asylum independent of removal proceedings.

MR. STEWART: I think the key point there, your Honor, is that we just -- it's still speculative as to whether that person is going to have this rule applied to them. We just don't know how that's --

THE COURT: Well, but this person is represented in this case and has clearly indicated an interest in obtaining asylum. Why isn't it -- you know, it's not much of a jump to say that if -- but for this rule that says you can't apply for asylum, this individual would apply for asylum.

MR. STEWART: As to that person though, your Honor -- I mean, again, as your Honor has emphasized, the rule is enjoined. We're not sure if it will go back into effect sometime in the future. It could be the case that this person finishes their prosecution and is just put into a section 240 proceeding. At that time, they'd have to make any sort of asylum claim through that. Again, it's just a little ways off.

And Congress was very -- one overarching theme of this expansive reticulated and careful review scheme is Congress was quite careful to -- where it channeled

jurisdiction. It did not want to use a general -- just the general 1331 approach. It was like look, you know, when you have these individual aliens who are seeking relief from removal, we use this path.

If somebody makes a systemic challenge and they're subject to expedited removal, it's this path. Generally for expedited removal, there is not significant judicial review. So it's a very careful scheme.

THE COURT: It's a careful scheme, but it's careful in the sense that -- my understanding of the history of this is that Congress was concerned about people -- individual aliens using the APA. And they said no, don't use the APA, use the INA as the reason -- as the basis of your challenge. This case is a little bit different in that it is -- it applies to, I mean, I take it by the Government's own count potentially hundreds of thousands of people.

That does feel different than a circumstance in which someone is in an asylum proceeding and they say -- or in a removal proceeding and they say, "I think I'm entitled to asylum. I'm going to bring an APA challenge, and I'm not going to bother letting this immigration judge and the BIA decide my case. I'm going to run to court and seek relief under the APA." Congress says no to that.

That feels different, and I understand why you

channel those cases and say no, if you're an alien who's seeking relief in a -- relating to your removal, you ought to do it in the removal proceeding. You ought not go to court. This is a case in which I take it the plaintiffs may seek to certify a class of potentially hundreds of thousands of people saying we're not even entitled to apply here, and we want the right to apply for asylum.

MR. STEWART: Right, your Honor. I guess a couple points in response to that. I'll hold off on the class point, because obviously we have various arguments about class treatment. But I can address that in the appropriate course. The thing I'd say though, your Honor, is that it's very common for courts to just simply say look, you can bring your claim and you can have judicial review of it in a federal court, but that court is going to be after exhaustion of administrative remedies and in a federal court of appeals. The courts of appeals do these all the time.

I mean, in the J.E.F.M. case, your Honor, which is one of the leading cases on this sort of thing, the Court said hey, look, you can't bring this constitutional claim in district court seeking a right to counsel. But the Ninth Circuit just last week in a follow on case did hear precisely that kind of a claim in a petition for review setting; so after somebody got out of the Board of Immigration Appeals and the immigration courts. So this is

common, people can get judicial review, it's just it needs to go through the steps that Congress --

THE COURT: Although I would think that this is one of those rare cases in which the Department of Justice and the Department of Homeland Security and just the Executive Branch more generally would have a real interest in actually getting a resolution to this issue sooner rather than later. And that if you go through the process of saying no, you've got to raise this through the IJ process, then BIA and courts of appeals, then maybe two years from now, I don't know, three years from now, four years from now you get a decision from the Ninth Circuit. And then five, six years from now you get a decision from the Second Circuit that takes a different view on it. And you're many, many years down the road before you have any resolution of whether the Attorney General's exercise of authority here was lawful or not.

And that seems to be counter to the purpose of what the Attorney General and the Secretary of Homeland Security and the President are trying to achieve here of making clear to people that if you come into the United States across the Mexican border and not through a port of entry, a designated port of entry, you're out of luck and you can't apply for asylum.

But if you're one of these groups that's out there

advising aliens -- you know, obviously they're not advising aliens to enter illegally. But if you're advising aliens with respect to their rights saying, you know, I don't know whether you can be able to do it or not, that's going to get decided by the courts a couple years from now.

MR. STEWART: Your Honor, I would agree that we would like to have quick resolution. Part of the difficulty for the way these suits were challenged was we do have the East Bay injunction that was issued in a case that was filed the day of the rule.

THE COURT: Right.

MR. STEWART: We didn't have a chance to have aliens agreed by the rule able to bring an appropriate lawsuit. We had this nationwide injunction given at the behest of organizations. So that's somewhat thrown things amiss. I mean, the state of affairs, as your Honor suggested, could change if that were stayed or if it were more limited in scope. And then other appropriate individual aliens might be able to then file suit.

But given the current state of the situation now, we're arguing consistent with what we frequently argue in district court litigation for folks who are in section 240 proceedings; that those section 240 proceedings are the appropriate places for aliens in those proceedings to raise these claims, especially as to asylum.

THE COURT: So what about the organizational standing? Is there anything about the D.C. Circuit law that would counsel a different decision than the Ninth Circuit reached with respect to organizational standing?

MR. STEWART: I think a couple of things, your Honor. One as to the expedited removal piece of things, the AILA case is pretty firmly against organizational standing. It focuses on I believe pages 1259 to 1250 that -- 1260 that the expedited removal proceedings were -- under section 1252 are supposed to be challenged, if at all, by aliens actually subject to those proceedings.

The other point I'd mention, your Honor, and I think with respect to Judge Bybee's opinion, Judge Tigar's opinion, I think a key problem here and one we try to emphasize in our briefing is that the injuries are really speculative. The rule by design, what it tries to do is channel people to ports of entry so that they can lawfully enter and then affirmatively apply for asylum or pursue other relief. There are of course a great number of aliens in the country.

There's no certainty, there's no definite establishment of the sort needed to establish Article III standing that the organizations here will not be able to serve aliens, serve a great many of these aliens. They don't have really much of a cognizable interest in aliens

who enter unlawfully.

THE COURT: Right, but if you have set resources to assist aliens, and your mission is to assist as many aliens as possible in obtaining relief; and if you're told now that the alien is not allowed to apply -- I'm sorry, is not eligible for asylum, you then as a matter of prudence in every one of those cases, no matter how strong you think your asylum claim is, are going to have to come in as well and make the higher showing for withholding of removal. And that's going to be more resource intensive to do that. And that's just one example of what you'll have to do. And so you are going to have to expend additional resources in those proceedings.

And as a result of it, you're going to be able to represent fewer people, and you're going to be less able to achieve the missions of your organization.

MR. STEWART: Your Honor, what I'd push back on is that I think it's too speculative in injury. Because we still have people coming through ports of entry. We have many people in the United States already who could seek these organizations' services. Those are a great number of people. There's -- it could certainly be the case that they can continue to serve those people, and then by the time the rule takes effect it channels people through ports of entry and they have --

THE COURT: But I think you're making actually a point which is a different point which is actually just really I think the inverse of the point I'm making. I think you're making the point --

MR. STEWART: I'm sorry, your Honor.

THE COURT: Well, I think there was some argument about this either in this case or in one of the other cases that said one of the problems is that there are going to be fewer people coming into the United States because people are going to be channeled through the ports of entry and that's going to hurt the organizations.

What I'm actually raising is just the opposite point; not that they're going to have fewer clients, but that they're going to actually be able to -- they may have more clients than they could ever help or assist, and their problem is they're going to be able to help fewer of those people that their mission is about helping because it's going to be more resource intensive for them to do so. Because instead of satisfying the lower asylum standard in each case, they're going to have to preserve their arguments with respect to asylum so they can take an appeal eventually; but also prove that either this is a case that's appropriate for withholding of removal or it's a case that the Convention against Torture applies to or some other law would provide some protection to.

So you may have -- your goal may be to help as many people as you can. You may be helping 100 people a year now, and you're going to be able to help 50 people a year going forward because you're going to have to devote more resources to this.

MR. STEWART: I think, your Honor, it still falls into the problem of just too speculative. Because look, there's a very large people to -- group of people to draw from. There's a distinct possibility that the relevant organizations can continue serving people that don't impose the higher costs that your Honor has described. And that in the meantime, while they're continuing to serve people who would be eligible for a grant of asylum, the rule would be able to channel people through ports of entry. So we'd be talking about people who are no longer subject to a proclamation suspension because they're within the port of entry suspension. And you could have as a result a high flow of people who could be served. So it's just speculative, it could go --

THE COURT: It might, although I think that -- I mean, I take your point if these were businesses that were looking to sort of serve as many customers as they could and that there may be customers out there they could get. I mean, I take it part of the mission of these organizations are to help people who are in most need of help. And their

view might be is that the people who are most needing help are the people who are coming across the border perhaps illegally. And not that that should be encouraged, but if they've done it, that they need help. And it's not sufficient to say well, there are other people we could help out there who don't need our help as much.

MR. STEWART: I think I'd stick with the -- I would stick with my points about the speculation and how the rule could unfold, your Honor. I'd also add if I could hit the zone of interest point --

THE COURT: Please, I was hoping you would.

MR. STEWART: I think as a top line point here, your Honor, one of the signals about whether aliens follow within the zone of interest is what is the jurisdictional channeling scheme. And as we talked about earlier, what this -- what Congress was really trying to do in section 1252(a)(5) and (b)(9) was channel the claims of individual aliens into the federal courts of appeals. They didn't want -- there are various bars on class actions for -- in the expedited removal context, various bars on broad sweeping relief. They wanted individual type claims.

It would be very odd if despite that careful review scheme that tries to channel asylum related, removal related claims into the courts of appeals on an individual, non class basis if organizations could then come in, even

though they're kind of bystanders to the statutory scheme, they're not aliens, and do an end-run around that reticulated system and kind of seek sweeping relief on behalf -- here the request would be a nationwide scale.

It would be -- it goes to the point -- in addition to as we've said, and as other court cases confirmed, the immigration laws are not -- are meant to benefit individual aliens or in some cases benefit the Government. They're not meant to benefit service organizations, even though service organizations are occasionally mentioned.

THE COURT: But I can't remember if it was -- I think it was -- which was it? Was it the Fair Housing Act that was at issue in Havens? It was an anti-discrimination law that wasn't enacted for purposes of protecting organizations that represent people who have been the victims of discrimination in housing, and that seems to me pretty analogous to this circumstance.

MR. STEWART: Your Honor, I don't recall in Havens there being this kind of a review scheme where you go through the federal courts of appeals, suits on an individual basis. It's I think different in kind like --

THE COURT: Although there are -- I mean, I'd have to go back and remind myself of what the scheme was, but most of the anti-discrimination laws do have schemes where you've got to go to the EEOC first and get a right to sue

letter or something of that nature. It may be that whatever statute was at issue there didn't have that, but that's often the case in anti-discrimination laws.

MR. STEWART: I take that point, your Honor. I would emphasize, though, the point I hit earlier about when you have a statute that's so focused on channeling removal related claims on an individual basis through an administrative review process, and then still on an individual basis through the federal courts -- the courts of appeals rather than district court class action type proceedings, it's pretty telling as to where organizations would fall in that scheme. And we would suggest for those reasons, and the other reasons we've described, that the organizations here would fall outside the statutory zone of interest.

THE COURT: Am I right that your arguments with respect to the organizational standing are no Article III standing and they don't fall within the zone of interest?

MR. STEWART: That's right, and kind of no cause -- I mean, they're similar in that way, but similar no cause of action.

THE COURT: But the cause of action and the zone of interest I take it are analogous?

MR. STEWART: Right, yeah, similar kind of themes and points, your Honor.

THE COURT: Okay. Anything else you wanted to say with respect to jurisdiction?

MR. STEWART: I think that's all I have for the moment on jurisdiction, your Honor.

THE COURT: Do you want to address now or later the questions I posed about whether -- how this case interacts with the East Bay litigation?

MR. STEWART: Sure, your Honor. I think I'd say two points. One is that, as we've said, so long as there's a universal injunction in place as a result of the East Bay litigation, there's no irreparable harm or imminent irreparable harm that's faced these plaintiffs. That's on top of the other reasons we've said, that many are in -- most of the individuals are in section 240 proceedings so they don't face an imminent threat of removal at all.

I'd say in addition to the absence of irreparable harm which would defeat any kind of injunctive relief here, it does affect I think the sound exercise of just the Court's equity and discretion ruling in a way that creates kind of a needless second injunction. But I would emphasize the irreparable harm point, your Honor.

THE COURT: And what about Rule 57 and the notion of having just expedited proceedings on declaratory relief or injunctive relief through cross-motions for summary judgment?

MR. STEWART: I think we would be -- I'd have to think about the declaratory judgment action, your Honor. Because I think -- not putting aside whether we'd have just threshold jurisdictional questions about the availability of certain remedies, I mean, the Government would be willing to brief very swiftly whatever would come up.

THE COURT: It's hard to believe that there's a whole lot more to say at this point, but there may be.

MR. STEWART: I mean, there's a lot covered so far. I guess what I would say here, your Honor, is that I don't see the -- although the Government's willing to move quickly, and although I'd kind of reserve whatever jurisdictional or other points we might --

THE COURT: Of course.

MR. STEWART: -- have on the declaratory judgment issue, until we see a little bit more about what happens with East Bay, it's not obvious maybe what the next step would be. So I just want to be careful about stepping on anything there.

THE COURT: I don't disagree with that.

MR. STEWART: As your Honor suggested, we may know more very soon. But --

THE COURT: Do you know when the response brief is due -- I mean, it's due today. Do you know if it's --

MR. STEWART: I believe it's --

THE COURT: -- due at 5:00 p.m.?

MR. STEWART: I want to say it's noon, but I could be mixing up my time zones on that.

THE COURT: Okay.

MR. STEWART: I do think it's noon Eastern. So things could proceed quickly there. I would say, I mean, the Government would support very quick further proceedings in this case, your Honor. I would say that the need for quickness in terms of granting relief is really absent here given the status of all the individual plaintiffs, so I would emphasize that.

THE COURT: Are the -- seven of the eight who are in removal proceedings, are they in the removal proceedings and not subject to any change with respect to that so that that will proceed as a matter of course which means that we're talking about a period of many months before anyone would actually be removed from the country even assuming that the East Bay injunction were lifted?

MR. STEWART: I believe that's right, your Honor. I think -- I have no reason to think it would be other than just months or even longer now that they're in section 240 proceedings. And that it would just play out that --

THE COURT: So the one question mark as to the individuals then would be A.V.?

MR. STEWART: Yes.

THE COURT: And in A.V., we just don't know what's going to happen at this point?

MR. STEWART: Right. I think we -- that's one where we need to see just what the next steps are, whether a notice to appear is issued as to A.V. or if expedited removal proceedings come in place which would inform what could then happen after that.

THE COURT: Would you have any objection to -- with respect to A.V., perhaps by consent, having some limited temporary restraining order in place or something of that nature such that -- just so that A.V. doesn't end up on a plane, and I then have the plaintiffs running into court saying Judge, there's a plane on its way to X country, you know, you've got to stop that plane or something of that nature; that we could at least give them a chance to be heard before A.V. was actually removed from the country?

MR. STEWART: The Government does that in some circumstances, your Honor. I'd want to take it back to the client agencies before that. But I can tell you that it's certainly not something that's sort of off the table, because we do do that in the interest -- in individual cases in the interest of sound administration. So if that were something that your Honor would like us to check on, we could check on that as to that person.

Again, I don't think there's any imminence related

to A.V. given that the criminal prosecution is still going on and then whatever proceedings would have to follow that. But I could look at that at the appropriate time.

THE COURT: Although I take it some of those criminal proceedings can move pretty quickly and that -- I don't know if this is at the border, but there --

MR. STEWART: Right, they can move --

THE COURT: -- could be, for example, a guilty plea that would happen very quickly, and then A.V. could just find himself or herself on a plane very shortly after that.

MR. STEWART: I'm not sure what the timeframe would be, your Honor, but I could check on that.

THE COURT: Okay. I think it's worth at least knowing that, yes. Okay, thank you.

MR. STEWART: Thank you, your Honor.

THE COURT: Just a second, please.

So before we turn to the merits, I guess I'd like to just give everyone a chance -- and particularly the court reporter, just a five minute break. So why don't we come back at 11:40 and we'll proceed from there. My goal is to finish this up before lunch, so we'll -- I think that the merits may not take as much time.

(Off the record at 11:29 a.m.)

(Back on the record at 11:43 a.m.)

THE COURT: Who's up on the merits?

MS. REYES: Good afternoon -- good morning, your Honor. I'm up on the merits, but we have just a couple more clarification points we need to make on jurisdiction if that's okay?

THE COURT: Okay, sure.

MS. OBERWETTER: Just a few additional items, your Honor. The first was we had an opportunity to discuss a little bit of what happened in here during our break. Obviously we're here asking for a TRO, and that is what we would like to have. If you are not inclined to do that in the short term pending what's going on in California, we would like -- first of all, we understood your offer to be that you would be available on short to no notice. We would also like a commitment from the Government that they would not be enforcing the rule against anybody in the interim since obviously there are putative class actions in the S.M.S.R. case. And there are more people than just the eight individual plaintiffs who this obviously would affect.

We are also amenable to doing expedited declaratory judgment briefing that we believe could be done concurrently with class briefing. And I know from our standpoint -- and I'll touch on this again in a moment, we are likely to add class allegations in the O.A. case. And we also have several additional plaintiffs that I think will

relate to some of the other issues that I'll just touch on briefly.

THE COURT: Okay.

MS. OBERWETTER: Separately, I'd like to talk briefly about the Government's discussion of the status of the --

THE COURT: Just before you turn to that, has A.V. applied for asylum?

MS. OBERWETTER: Has there been an affirmative --

THE COURT: Yes.

MS. OBERWETTER: -- application for asylum?

THE COURT: Yes.

MS. OBERWETTER: Not to my knowledge. Speaking for the O.A. individuals, not yet to my knowledge.

THE COURT: Okay. A.V. is one of the O.A. --

MS. OBERWETTER: That is correct.

THE COURT: -- plaintiffs? Yes, okay. Oh, and that actually reminds me of another question I had. Is there anyone who objects to consolidating these two cases, any objection to consolidation?

MS. OBERWETTER: No objection, your Honor.

THE COURT: Okay. I hereby order, then, the cases be consolidated. Thank you.

MS. OBERWETTER: Yes, your Honor. Just to talk briefly about the status of the eight individuals. I think

the Government's understanding is that for a number of them, their notices to appear have been corrected. Our understanding is that dates have been set for certain of the removal proceedings, but may not have -- but there may not be corrected NTAs yet, or notices to appear, at least not that we have seen.

And at least as of this morning when last we checked, I do not believe that dates have yet been set for either D.S. or for her child C.A. So I'd just like to note that. I'm not sure that it matters for any of the jurisdictional issues or otherwise.

A couple of points I'd like to make on A.V. that I think are relevant to the jurisdictional issues and for some of the questions you had for the Government. First of all, I note some of your questions were is anything going to happen to her on short notice. Some of the additional plaintiffs that I know we are presently planning to add are also in the expedited removal posture.

And let me add there is an aspect of this uncertainty to her status that creates a real problem under 1252; which is under (e)(3), there's a 60-day limit for bringing a claim. That clock is ticking now. So it really creates kind of a Kafkaesque position for the Government to say well, who knows how she's going to be treated, let's wait and see. Because there's a real consequence to that

for her actual ability to bring a claim under --

THE COURT: So is she actually in expedited removal or is the Government contemplating the possibility that she would be or he would be in expedited removal?

MS. OBERWETTER: We have -- it's a she, your Honor. We have seen both statements in the Government's papers, so I think we would like more clarification from that. But either way, I think it is fair to assume from what the Government has said that the current intent of the Government is to have her in an expedited removal posture.

THE COURT: I think you're entitled to know whether your client is in expedited removal proceedings or not, so I think it's a fair question.

MS. OBERWETTER: Thank you, your Honor. So I'd also like to, just in talking briefly, just to go back to a sort of fundamental big picture point that I think infects a lot of the arguments that the Government is making. The fact that this rule can apply to -- and I mean the Government's new rule can apply to people who are not going through the removal process proves that fundamentally it is not the kind of rule that is meant to be funneled through 1252.

And I think it would be pretty remarkable that Congress would have intended that a jurisdiction stripping and channeling statute about removal would suddenly bar

claims that are about eligibility in the first instance, a new mandatory bar for eligibility to asylum. I don't think there's any evidence that the statute is meant to sweep so broadly whether you're looking at regular removal proceedings or expedited removal proceedings, your Honor. It is a different in kind type of rule to something that is -- than is the kind of thing that should normally go through the removal process.

And I think that's -- those are the additional things I wanted to address, your Honor, unless you have other --

THE COURT: Okay. Well, I'm going to want to come back to next steps of where we go from here, but let's wait until we're done. And then at the end, that's the final thing we can take up.

MS. OBERWETTER: And I just want to see if Mr. Reich had anything additional.

MR. REICH: If I could make a couple of additional points, your Honor?

THE COURT: Okay.

MS. OBERWETTER: Thank you, your Honor.

MR. REICH: Really just a few quick points. First on the jurisdiction for the individual plaintiffs, my -- your Honor asked when the removal proceedings began and what kicked off (b)(9) jurisdiction in the Government's view.

And the Government said it was the issuance of the notices to appear. And I didn't hear any acknowledgement by the Government that those notices were defective. They were not notices to appear within the meaning of Pereira v. Sessions which they plainly were not, and so I think that really begins and ends the question on that. The case for (b)(9) jurisdiction is based on notices that --

THE COURT: Although I think they say now that they've been cured. I don't know.

MR. REICH: So as Ms. Oberwetter said, my understanding is they've scheduled dates for these hearings. But I'm not aware of whether actually new notices have been issued. In any event, as your Honor suggested, the issuance of new notices to appear, even valid ones long after the claims are brought, can't possibly mean that the claims actually arose from the later filed notices.

As to organizational standing, I think your Honor described it exactly right that the mission of these organizations is to help those most in need, and to help individuals in these detention centers facing asylum -- facing the threat of removal and trying to press asylum claims. And the Government's position that the organizations won't suffer any injury if they just pick out the ones who aren't subject to this rule is going to be a grave blow to these organizations' mission. And I think

that really begins and ends the standing question.

The Government cited -- mentioned the AILA case. AILA is irrelevant for a number of reasons. One, AILA was a claim where organizations had a case based on third party standing, not on their own rights. And second of all, it was just within the scope of the expedited removal scheme. And the suggestion that 1252 in general revokes organizations' rights to press claims I think is inconsistent with the purpose of this statute which was not to strip jurisdiction from anybody, it was just to channel the claims brought by aliens.

So I think the notion that organizations were trying to be kept out, there's really no support for that certainly in the text, let alone the history and purpose of the statute.

THE COURT: Okay, thank you.

MR. REICH: Thank you.

THE COURT: Mr. Stewart, do you want to get a final word on any of this?

MR. STEWART: Thank you, your Honor. I'll be quick on it. Three quick points, your Honor. First, if it would be helpful to your Honor, we could get kind of updated, most up to date notices to appears, dates and times, those sorts of things. We don't concede that any of the notices to appear were defective here, but we do say

that whatever defectiveness could be claimed, it's cured now because there are dates and times as to all people. People must be bring asylum claims on eligibility in those proceedings.

THE COURT: I think it would be helpful if you have the actual notices, to go ahead and just file those so we all are working off the same record.

MR. STEWART: Very good. We can get those in, your Honor. As to A.V., this is one of those situations where it's worth being precise, so let me see if I can just describe it. A.V. is in expedited removal proceedings. Because A.V. is being prosecuted, there's been no -- like those proceedings have not progressed very far. The key thing about A.V. is that the rule has not been applied to A.V. It's not clear that it ever will be.

THE COURT: But what about the plaintiffs' point about the 60-day clock? I mean, don't they have to bring that claim now, then? It's not clear what's going to happen, and they've got 60 days to do it. I don't know how long she's been in expedited removal proceedings, but the clock is running.

MR. STEWART: There is a 60-day clock. Judge Randolph's opinion in AILA, your Honor, emphasizes like look, we understand that there's a very strict time clock. Congress got that too. It understood that aliens facing

expedited removal will sometimes be in -- or very often be in difficult circumstances, and it will be hard to bring suit within that timeline. The D.C. Circuit's already upheld that as a lawful -- as a feature of the expedited removal.

THE COURT: But all I mean, though, is isn't that a response to the Government's contention, well, we don't really know whether and how the asylum issue is going to be raised in her proceeding and how she'll be treated with respect to any claim to asylum. And therefore, it's premature to raise and litigate these issues. And isn't it a pretty good comeback to that to say, well, you may say it's premature, but it's just premature because you haven't decided what to do. We've got a 60-day clock. You know, it can't be that the Government gets to frustrate your ability to bring a challenge ever by just waiting out the 60-day clock without making a firm decision about how they're going to proceed.

MR. STEWART: I don't think so, your Honor. I think we still need to see what ends up happening with those proceedings, if there's -- if the rule is applied at all, if A.V. ends up in section 240 proceedings. But I think those are the key submissions there, your Honor.

THE COURT: Okay.

MR. REICH: And I think we can get the NTA

information into the Court so you have --

THE COURT: Okay, thank you, I appreciate that. All right, so the merits.

MS. REYES: Good afternoon, your Honor. I'm sensitive to the Court's request that we finish by lunchtime, and I am also sensitive to the Court's indication that the merits might need to be shorter -- can be shorter. I don't want to --

THE COURT: Yeah, I mean, I think we can go until 1:00 o'clock, so that gives us some time.

MS. REYES: Okay. In that case, your Honor, I will start on 1158(a)(1). 8 U.S.C. 1158(a) provides as applicable, "Any alien who is physically present in the United States, or who arrives in the United States, whether or not at a designated port of arrival, irrespective of such person's status, may apply for asylum in accordance with this section." The rule violates the plain text of this language by providing that people arriving not at a designated port of arrival are categorically barred from obtaining asylum.

And the Government's response to this, your Honor, is guys, it's not a problem, because they can apply for asylum. We're not stopping them from applying for asylum, they can apply for asylum all day long. It's just that they're never going to get it, they're categorically barred

from getting it. They're not eligible. And so don't worry you can apply, you're just not going to get it. That's not an answer. You are taking away the meaningful right to apply for asylum, and anyone exercising a modicum of common-sense would understand that.

Now, the district court I think in East Bay said it best -- although the Ninth Circuit which I think said it well, so I'll just quote them briefly. The district court said, quote, the argument strains credulity. To say that one may apply for something one has no right to receive is to render the right to apply a dead letter. There's simply no reasonable way to harmonize the two. That was the district court.

The Government took an appeal. The Ninth Circuit was equally blunt, quote, it is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact.

Now, the Government's argument in an attempt to save the rule is that there are technical differences somehow between applying for and being eligible for asylum. But the Government hasn't actually identified any technical difference. And there is no technical difference. The Ninth Circuit recognized this saying those technical

differences are, quote, of no consequence to a refugee when the bottom line of no possibility of asylum is the same, end quote.

And I think that's where we are in this argument, your Honor, which is to say whether the rule says you can't apply for asylum or whether the rule says you're categorically ineligible for asylum, the outcome is exactly the same: The individual does not get asylum.

Now I'm going to steal from the Hogan Lovells brief here for a second. They had what I thought was a good analogy. And I'm reminded that a lot of our paralegals are applying for law school these days. One of my favorite paralegals is applying for law school. And if I took it and said to her there is a law that says everyone, irrespective of race, is entitled to apply for law school. But there's a regulation that says you're entitled to apply for law school, but if you're African American you're not eligible to be admitted into the law school. And if I asked her would that rule violate the law, she would say of course. Because either way you're not in law school because of your race which is what the law precisely says you're entitled to apply for.

Another argument that the Government raises is that we're not really penalizing people for coming in outside of the border -- or outside of the port of entry.

What we're doing is penalizing them for violating a Presidential proclamation. And the Ninth Circuit readily shot that argument down as well for the simple reason that the Presidential proclamation doesn't do anything that doesn't already exist in law, which is prevent people from coming in outside of a port of entry. The rule and the proclamation together do precisely what the INA prohibits which is prevent people from obtaining asylum based on how they entered the country. And that is precisely what the rule and proclamation is intended to do. By their own admission that's what it's intended to do, so that's no argument as well.

And finally, your Honor, with respect to 1158(a)(1), as was set out in the brief of the United Nations High Commissioner for Refugees which is the entity entrusted by the United Nations to help countries interpret the refugee protocols, this rule as they state also violates article 31 of the 1967 protocol which Congress amended 1158(a)(1) to bring U.S. law in conformance with.

And just briefly, your Honor, that article says that states cannot penalize individuals who are seeking asylum based on their manner of entry. The Government attempts to somehow distinguish that article in two different ways. They say that it requires direct travel from Mexico to the United States, and if you've come from

anywhere else it's not applicable. UNHCR states unequivocally that that's an inaccurate reading. And of course it's an inaccurate reading. It's not saying that you have to be from one continuous land mass to the other, it's saying you just can't resettle somewhere else before you come to the United States. And in fact, U.S. law is in conformance with that requirement as well. And secondly, they say that the article only applies to criminal penalties. The word criminal is nowhere in the article. It applies to all penalties as UNHCR confirmed.

And finally, your Honor, I would just conclude by noting that what the Executive Branch is trying to do here is to legislate. They are trying to undo what Congress through 1158(a)(1) was expressly clear they could not do, which is disqualify individuals from obtaining asylum based on their manner of entry.

I believe Mr. Reich will cover the APA challenge.

THE COURT: Okay. Just before you turn to that, do you want to say anything at all about the Trafficking Victims Protection Reauthorization Act or should I take it as a separate argument you've raised?

MS. REYES: If you have questions on that, your Honor, but we're ready to rest on the papers on that.

THE COURT: Okay, that's fine.

MR. REICH: I'll address both the substantive and

procedural claims under the APA, and also an additional argument both parties raised under 1158(b)(2). And I'll start with the procedural claim under the APA, because as Judge Bybee explains, there's no dispute at all that this rule was not issued with following the notice and comment procedures or the 30-day publication requirements. And the Government's attempt to fit in one of the reluctantly countenanced and narrowly construed exceptions to that central procedural requirement to the APA are totally unavailing.

The Government's pointed to two exceptions, good cause and foreign affairs exception. Judge Bybee correctly rejected them both, and I'll just walk through them briefly.

The good cause exception, the D.C. Circuit has held repeatedly this exception is limited to emergency circumstances and cases where delaying issuance of the rule would pose an imminent threat to life or property. And the Government has to point to evidence, factual findings in the rule, not speculation, to support that claim.

THE COURT: Well, I mean, the Government does say that there would be a threat to life or safety here, because part of the Government's goal in adopting the rule is to try and dissuade people from coming across the border illegally or not at a port of entry. And it is true that when people do that, they at times die.

And so to the extent that the Government is correct in its prediction -- and I have to give some deference to the Government on these types of issues. If they're correct in their prediction that this will actually funnel some people through the actual designated entry points and to keep them from trying to cross in dangerous places, they have a plausible argument that there is a life or safety issue here.

MR. REICH: Yes, your Honor. And I think the question is what did they say to support that prediction. The D.C. Circuit's precedent is unequivocal, that you need evidence and you need factual findings to support it, not just speculation. And it has to be not just the general fact that aliens cross the border illegally, that's been happening for decades. It's actually at the lowest level in 46 years.

Their claim really rests on this notion this was going to prompt a surge of immigration across the border. And when you look at the rule, I think it's striking it's just a total absence of any factual support or factual basis of any kind for that prediction. On the contrary, what the Government says very candidly and sort of remarkably, they say the departments are in no position to predict how this will affect aliens' incentives to cross the border.

And indeed, they note that many aliens may not

change their plans at all because of this rule given the availability of withholding of removal and CAT relief in the country. Moreover, the crisis the Government is pointing to is in some respect one that's of its own making. The only reason aliens would feel under this rule a need to surge across the border is because the ports of entry are being essentially shuttered by this metering practice. And if the Government -- we're not challenging that practice, but if the Government didn't engage in that practice, aliens could walk through that door.

THE COURT: So I'm not saying that there is perfect knowledge among people who are deciding whether to enter the United States illegally or not, but if you were one of those people and you had perfect knowledge; and you knew that this rule was going to take effect in 30 days; and you didn't want to go wait in line at the designated border crossing, wouldn't you say, well, I better make sure I get across in the 30 days because otherwise I'm not going to be eligible to apply for -- I won't be eligible for asylum. And that's a big loss to me. My theory of why I'm allowed to immigrate to the United States is asylum, and I better do it.

MR. REICH: Well, a couple points, your Honor. One is we've actually had an actual experiment --

THE COURT: Yes, correct.

MR. REICH: -- because this has happened where the rule was announced, and it was stayed 10 days later. No evidence of any kind that that happened. And in fact, the President said the border is secure, there's not a problem. So I think that's sort of -- the question was as a common-sense matter, is that going to happen. Sort of facts indicate no, it's not.

And if the agencies had some reason to think this was going to happen -- this is CBP, ICE. They have a huge amount of intelligence information about what these aliens are doing. If they had some reason to think there were people on the cusp of coming in who were going to change their plans by this, I think they would have pointed to it.

And I'd also make a broader point which is anytime the Government issues a rule that restricts conduct, it can always claim that in the period before the rule goes into effect, the parties will be incentivized to get in their violations while they can before it goes into effect. In the Mobil Oil Corp case that both parties cite, the Court of Appeals said this is not a general escape clause from the requirements to follow notice and comments. You need to point to some specific, very significant harm that is likely to happen. And --

THE COURT: Will this objection that you're raising with respect to this be cured when the department

issues a final rule?

MR. REICH: No, your Honor. In the Sorenson case -- or in the Mack Trucks case, the D.C. Circuit talks about this would be a completely hollow right if the agency could just say, well, we know we didn't give you notice -- an opportunity to comment before issuance, and we know we didn't delay publication, but now we've issued it and now we've received comments.

THE COURT: In your view, the Court would have to set aside the rule entirely or would it be just during the interim period that people who entered the United States during that interim period would be entitled to relief?

MR. REICH: It would -- the proper remedy -- and the D.C. Circuit says this I believe it's in Mack Trucks, is vacatur of the rule. The agency -- they started the comment process, they could certainly continue that. But it could not be put into effect until comments are received and the 30-day publication period was complied with.

As to the foreign affairs exception, I can just touch on it briefly. Every court to look at this exception has said it is not sufficient that a rule implicates foreign affairs. That would be true of almost every immigration policy. It needs to be something that would provoke -- where immediate issuance is necessary to avoid provoking definitely undesirable international consequences. And

every precedent any party has cited where this rule was invoked, it was a case where immediate issuance was necessary to avoid breaching an international agreement, to prevent an international crisis like the Iran Hostage Crisis.

And what we have here is, in the Government's own words, that this rule implicates relations with Mexico and relates to negotiations with them. And as Judge Bybee explained, that falls short on at least two levels. One is there's no claim that the rule is in any way necessary for those negotiations, that failing to issue it will undermine them. Still less that issuing it now rather than noticing it now and issuing it a month or two later is going to have any effect on negotiations. So I just don't think they've made the findings or the statements that would be legally necessary to invoke the exception.

On the substantive APA requirement issue, Judge Bybee talked about that the agency decision making requires both looking at relevant factors, which is something he talked about, and also having a logical connection between facts found and the choice made. And here, as the Ninth Circuit put it, this rule makes asylum eligibility hinge on something that has nothing to do with asylum.

If you look at the statutes, every exception limitation on asylum is all hinged on the alien's own

fitness to receive asylum; whether the alien is a criminal, is a danger to the country or whether the alien is for some reason not in need of humanitarian relief because there's a third country he could go to or so on. And this rule doesn't claim in any way that the aliens that are subject to it are not fit for asylum. It acknowledges the very same people could be great candidates for asylum. And it's using the asylum system as a lever to achieve second order goals like preventing unlawful immigration or saving resources. And even as to those goals, I don't think the rule has the reasoned basis the APA requires for showing that the rule would even achieve them.

As to the channeling points, as I said, the Government acknowledges quite remarkably in the rule we really have no idea if this is going to affect any alien's calculus at all. And I think they don't point to any reason that it would, and they don't consider many countervailing reasons that it wouldn't including the fact that the ports of entry are metered and aliens can't get in; the fact that when aliens are forced to wait in Mexico, they're often in refugee camps with truly appalling conditions where cartel activity is rampant.

Aliens would rationally decide I'd rather go into the country, try to get withholding of removal and CAT relief which already rates -- grant rates can be as high as

50 percent, and could well go up after this rule. So an alien could rationally decide they'd rather do that than get no relief at all. And again, we have no evidence even since this rule has been in effect that this is altering -- we have no evidence that this is altering anyone's -- any alien's calculus.

And then with respect to the notion that this would save resources, the Supreme Court talked in --

THE COURT: May I just --

MR. REICH: Yes.

THE COURT: I just want to -- I suppose one further issue just for me to think through with respect to the rationality of the rule is that the rule doesn't actually expressly on its face encompass the policy against entry at a point other than the designated point -- port of entry.

So the question I guess I -- one thing for me to think about is whether I can -- if there's anything for me to defer to that the Attorney General has done here. Because the Attorney General actually didn't make that determination, the Attorney General simply made a determination that anything that the President says with respect to the border goes.

MR. REICH: Yes, your Honor. And I think that really opens up a whole separate set of problems with this

rule which is that the Attorney General, rather than making the critical determinations about conditions and limitations on his own, has just prospectively incorporated whatever the President wants to do. And the President gets to determine how long the limitations last, who they apply to, who's excepted from them.

And I think the real tell is it says, well, the rule could exclude this class of people, but then the President can determine who within the class is going to be ineligible for asylum. So the President has the whip hand in every respect here, and the agencies have just committed wholesale to his decision -- which one thing is plain violation of statutory text which the Supreme Court said in Sale, construing the refugee act, when it talks about the Attorney General it does not mean the President. And they actually used the word the President would usurp the Attorney General's authority by trying to exercise it.

And as a procedural matter -- which you were just getting to, it allows the President to evade the regulation and APA requirements. The President -- nobody is getting a chance to comment on or get meaningful judicial review of the substance of these restrictions, and that's not the scheme that Congress designed.

THE COURT: Okay.

MR. REICH: If there are no further questions?

THE COURT: No, thank you.

Mr. Stewart?

MR. STEWART: Thank you, your Honor. The rule is lawful both substantively and procedurally. Substantively as we've explained, your Honor, the text and structure of section 1158 allows this sort of broad exercise of discretion by the agency heads. 1158(b)(2)(C) makes clear that the Attorney General can issue additional conditions or limitations on asylum. Asylum itself is under section 1158(b), a matter of discretion for the agency heads. No one is entitled to asylum, it's entirely discretionary.

1158(b) in fact, to the extent it issues guidance on this matter, it's saying where the Attorney General cannot grant asylum, not when he must grant asylum. Asylum is, at every turn, a matter imbued with agency discretion. It's recognized in the matter of Kula and recognized in the matter of Saleem. Nothing in section 1158 bars the consideration of manner of entry as a relevant feature in asylum.

And if it can be considered case by case -- and it is concededly dispositive in some cases, then surely the agency can proceed by categorical adjudication. And that's especially clear in a case like this, your Honor, where it's not even manner of --

THE COURT: But isn't that --

MR. STEWART: -- entry per se.

THE COURT: -- the difference, though, between a bar on applying and a bar on eligibility in that if it's a categorical rule and it says you just are categorically ineligible, I don't understand what the distinction is between applying and eligibility.

I mean, what does it mean -- the immigration judge would do, as I take it, exactly the same thing, right? You're the immigration judge. I show up and say, you know, "I came across the border. I'd like to apply for asylum." And you as the immigration judge say to the person, "Well, did you come across a designated port of entry or did you come across the border at some other point?"

"I came across at some other point."

"Did you do so after the proclamation took effect?"

"Yeah, yeah, it was after the proclamation took effect." You say, "Okay. Sorry, you can't apply," or "Sorry, you're not eligible." I mean, they're different words but it means -- it's exactly the same thing, isn't it --

MR. STEWART: Your Honor, I don't think --

THE COURT: -- versus -- let me just finish the thought, versus the BIA view that you can consider someone's means of entry in the overall calculus. There you're saying

no, no, I'm not saying you can't apply, and I will consider it along with everything else. And yeah, I considered the fact that you came across the border, but I also know that if I send you back that there is a near certainty that you and your entire family are going to be killed. And under those circumstances, even though you came across the border unlawfully, I can't in good conscience send you back.

Or you can say in considering all these various things, you know, you came across the border, but you've committed a bunch of crimes. You've done a bunch of other stuff that make you not particularly suitable for asylum. And for all these factors mixed together, I'm going to conclude you're not entitled to it.

That feels to me like a decision with respect to eligibility versus a decision with respect to applying. But when you just say you can't, you invariably lose. I don't see it.

MR. STEWART: That's invariably the case for many categories of people, your Honor. I mean, 1158(a)(1) does establish a broad general opportunity to submit an application. It immediately qualifies the efficacy of that application by saying hey, if you're in a safe third country, if you don't apply within a year and don't have exception or changed circumstances, if you firmly resettled. So immediately just to the application stage, that's

qualified.

THE COURT: But it may be that in some cases, that the distinction between eligibility and your ability to apply don't make any difference, you know, either way you lose, whatever. But here, there's a statute that says you're entitled to apply. You're entitled to apply, and it's implementing an international convention. And under the Charming Betsy canon, I'm required to consider the convention for purposes of interpreting the statute.

And so it's different from other circumstances where there may be other criteria that are specified in the statute or by Attorney General that render someone ineligible where it just doesn't matter whether you call it eligibility or applying, because there's not a statute that says you cannot bar someone from applying under these circumstances.

MR. STEWART: Sure, your Honor. I think what I'd emphasize is there is this broad right to apply, but the statute especially -- it sets that out in 1158(a). And then the statute turns in 1158(b) to emphasize first discretion. Anybody who applies and does not merit a favorable exercise of discretion, it's going to be a dead letter for them too, whatever their circumstances are. If they're not -- if they don't merit a discretionary grant of asylum --

THE COURT: Right, but that's the difference

between discretion versus non-discretion. I mean, I at least have a chance to be heard, to make my case, to have someone consider it versus a circumstance where you say you just lose at the outset, there's nothing here to even consider.

MR. STEWART: But again, that's similar to the situation for the statutory eligibility bars. People who've committed terrorism or people who've committed serious non-political crimes, persecuted people. Those people, applying for them is in a sense a dead letter because they are barred. And the same goes for --

THE COURT: Right.

MR. STEWART: -- somebody who just doesn't warrant any favorable --

THE COURT: Right, but applying for those people is a dead letter, that's right. And that's the point here, that where you're sort of categorically barred, applying is a dead letter. It's meaningless. And the point here, though, is that the statute only says you must -- the Government must allow someone to apply with respect to the issue that we're dealing with here.

It would be a real head scratcher frankly if the statute said that the Government must allow someone to apply for asylum even if they have safe haven in another country. And then the next sentence is and you're completely

ineligible under all circumstances for asylum. We'd be scratching our heads saying what was Congress thinking, I mean, that makes no sense whatsoever.

But that's not this circumstance here, because they've said that you have to allow someone to apply. They didn't say you can't consider it among other factors. But if it's the end of the debate or the end of the discussion, I guess I'm still wrestling with why Judge Bybee and Judge Tigar's take on this is not correct.

MR. STEWART: Sure, your Honor. I think -- the points I'd emphasize are kind of twofold. First, the statute is very clear on the difference between application and eligibility. I acknowledge that somebody who applies, it will be a dead letter for them if they hit some bar or otherwise don't warrant a favorable exercise of discretion or the like. I do think there's something different in kind for the establish -- the eligibility piece of things, because the statute is very clear about wide discretion, the Attorney General's authority to establish additional conditions or limitations. That's unqualified other than being consistent with the section. Asylum determinations or asylum grants are always discretionary. They can be granted -- they can't be granted in a way that, for example, gives asylum to somebody who has committed one of the terrorism offenses. Those people are barred.

I'd emphasize, your Honor, that it's not just independent of the statutory text and structure, especially the text of the different provisions of 1158(b). I'd emphasize that this is not a manner of entry bar per se, it's a particular kind of problematic manner of entry. It's one that hinges on a specific section, 212(f) or 215(a) determination by the President. That involves a situation -- a 212(f) determination involves a situation where the President has made a particularized finding that some kind of entry is detrimental to the -- or it's in the national interest to suspend that --

THE COURT: Congress --

MR. STEWART: -- kind of entry.

THE COURT: Congress made that determination. I mean, I have to say I'm really puzzled in this case as to what purpose the proclamation serves, because it's illegal to cross the border not at a port of entry. What I really don't -- I'm really puzzling. I mean, I don't mean this in any negative way, I just don't really understand --

MR. STEWART: Sure, your Honor.

THE COURT: -- what purpose the proclamation serves.

MR. STEWART: I'd say three things. First, that was a similar situation in the Sale case where undocumented Haitian refugees could not lawfully enter the country yet

they were still subject to President -- the President's entry bar despite the illegality of their entry. And the Supreme Court recognized that late in the opinion. And there's nothing wrong with doing that. That's thing one. Thing two is --

THE COURT: I wasn't saying there was something wrong with it, I just don't understand what purpose it serves.

MR. STEWART: I think it does reflect a presidential determination as to the importance and the particular problem for the national interest of a certain kind of entry. I mean, that's why the kind of entry that this proclamation is targeting, your Honor, it's not just any lawful entry -- unlawful entry at any border. What the rule is trying to combat is this huge number of aliens coming largely from the northern triangle countries who enter the country between ports of entry. They either evade detection and therefore evade enforcement of the asylum laws or they are apprehended, they make ultimate -- they make credible fear determinations. Because of the low bar they can satisfy them. They gain release into the country. And ultimately they don't have in the vast majority of cases meritorious asylum claims. That's what puts a tremendous strain on the --

THE COURT: I thought -- I mean, I'm not

disagreeing with you with respect to the numbers and the burden at the border that all this poses. But I thought that the numbers were actually that more people than not actually did have meritorious or were ultimately found to have meritorious asylum claims. Is that not correct?

MR. STEWART: No, your Honor. Of adjudicated cases for people who start in the credible fear process, a great many don't show up for their proceedings, never apply for asylum. And I believe -- the numbers are of course in our brief and in the rule, but I believe it's about 17 percent of this group actually get a grant of asylum.

THE COURT: That may be because people are just not showing up for whatever reasons they may have. But the majority of the people -- or more than a majority are clearing the initial credible fear hurdle, right?

MR. STEWART: Well, that's part of the problem, your Honor. A great number make the credible fear -- clear that threshold. The problem is there's that huge mismatch between that 89 percent or so and the ultimate people who actually end up getting asylum. That's the problem that strains the system.

THE COURT: I mean, I understand the point. I guess what I'm wondering, though, about all this is whether the solution is for Congress to amend the law and to take these things up. And if there are problems with the asylum

process, Congress has wide discretion. Congress is vested by the Constitution with the authority to adopt rules relating to immigration.

Why aren't these questions really ones for Congress rather than having the Executive Branch interpret a Congressional provision in a way that is hard to square with the statute? I mean, why not just go to Congress and say we need to fix this?

MR. STEWART: Because I think Congress has spoken to this issue, your Honor. Most of the statutory eligibility bars have been things Congress codified endorsing previously established eligibility bars by the Executive Branch. I mean, in addition to codifying that, Congress has already given the agency heads the broad discretion and authority to issue -- to impose additional limitations or regulations. So that is a broad grant of authority, it's a meaningful one.

And as the Supreme Court has recognized, the 1182(f) authority is similarly very broad. It's imbued with discretion. It gives the President ample power. Those things combined here show that Congress has spoken and allowed this sort of thing, especially when a condition on asylum eligibility is tethered to a particularized determination like this one that's a specific period of time, specific border, specific issue along that border.

THE COURT: I mean, I know it -- what is it, 90 days, is that what it was?

MR. STEWART: Ninety days or a safe third country agreement.

THE COURT: Right. I mean, there doesn't seem to be anything about this problem that the President is trying to address or the Attorney General or the Secretary of Homeland Security are trying to address that is really a 90-day problem. I mean, there's nothing identified that suggests that at the end of the 90 days, that this is not going to be a problem.

And in fact, if anything, it may be more of a problem at the end of the 90 days. Because if the President is successful in negotiating some arrangement with Mexico where people can stay in Mexico, and then people are coming through -- or required to come through a designated port of entry, it's just going to create additional strain on the system and additional incentives for people to be going across the borders illegally.

So I don't have any reason then to think that this wouldn't be extended repeatedly into the future. There's not like a 90-day crisis here that just needs to be addressed and then the problem's going to go away.

MR. STEWART: I think, your Honor -- I mean, as your Honor knows, executive orders and proclamations, often

they try to be limited in time very frequently to try to address the problem. There's reevaluation as there were in some of the travel related executive orders not too long ago. I think it's a question of where would we be if the rule were in effect at the end of 90 days. Would we have a safe third country agreement; would there be additional executive action appropriate. We just don't know.

One of the problems is that the rule was very quickly enjoined on a nationwide basis. So it was -- to the extent the rule was going to help with, for example, negotiations or anything, that's been hindered by a nationwide injunction. There's no confining in section 1182(f) the President's authority to extend a proclamation, to issue kind of a different modulated proclamation just for whatever time the President deems appropriate.

Here, the President took the prudent approach -- or the careful approach of let's try 90 days or maybe even earlier, a safe third country --

THE COURT: Yeah, I don't want to get bogged down in the 90 days. I don't think that's critical here. But I guess I'm still, though, struggling with why the President is doing this and what that does. You know, can the Attorney General really delegate in essence this authority? I mean, doesn't Sale speak to that question? And is it really -- hasn't in effect what the Attorney General has

done here is delegated to the President the authority to set conditions with respect to asylum?

MR. STEWART: No, your Honor. I think it's -- a 212(f) determination is a very particularized one. It falls in the President's can. And it involves a particularly kind of problematic entry into the United States that warrants specific presidential attention.

THE COURT: But that doesn't make any sense to me here, because it's already illegal to do it. People get criminally prosecuted for doing it. I mean, there's not like the President saying, you know, we've got a huge problem with people coming across the border illegally. I'll fix that problem, I'll issue a proclamation on it.

The proclamation is only meaningful to the extent it interacts with the Attorney General and the Secretary of Homeland Security regulation. Otherwise it does nothing, right?

MR. STEWART: They work together to do that. I mean, the proclamation does do some additional things, your Honor. It directs looking into of interdiction efforts and those sorts of things. It's mostly focused on the entry suspension.

What I'd emphasize there, your Honor, is it's reasonable for the agencies to think -- or to reach the conclusion that a particular class of -- group of aliens is

just categorically ineligible for the discretionary benefit of asylum when they violate a particular presidential determination that this kind of entry, even if already unlawful, is particularly detrimental to the national interest. That's what we have here. Contravention of a presidential proclamation is different in kind from unlawful entry per se.

THE COURT: In a way, though, that I -- I mean, boy, I just -- I mean, it seems to me that's just sort of upside down in some sense in that it's the Attorney General who's charged with making these determinations with respect to asylum. The delegation is to the Attorney General. Sales says the Attorney General has to make this determination.

And the Government's argument seems to be that sort of greater deference is owed here, because it's the President who made a determination with respect to the significance of unlawful entry versus the Attorney General when Sales says it's the Attorney General who actually has to do it.

So that's what I started with, I just don't really quite understand what work the proclamation is doing. It seems it's making the Government's case harder rather than easier.

MR. STEWART: I don't think so, your Honor. I

mean, as we emphasize in the briefing and as the rule itself emphasizes, there's something different in kind, your Honor, of violating or contravening a particular presidential determination. It's a national interest determination that the President is specifically entrusted to make. It's reasonable for the Attorney General and Secretary of Homeland Security to say, look, somebody who violates that kind of a presidential determination is different in kind from somebody who just --

THE COURT: Violates the criminal law?

MR. STEWART: You know, unlawfully enters and warrants a particular kind of response. We will still allow them to seek withholding of removal. We will still allow them to seek protection under the Convention against Torture. But they should not be eligible to be granted the discretionary benefit of asylum which brings forth all sorts of other benefits that the agencies very reasonably determined shouldn't be available to people who contravene this kind of a proclamation.

THE COURT: But I guess my question is why isn't that the question for Congress? I mean, I get the policy debate here, and that's none of my business. But what is my business is the question of whether that's a determination that Congress needs to make or whether the President can make, and whether the President and the Attorney General and

the Secretary of Homeland Security in making that determination have actually contravened the law as Congress has written it. That's the issue.

MR. STEWART: And my response would again be both the relevant provision 1158(b)(2)(C) and 1182(f) in particular are just imbued with discretion. 1158(b)(1)(A) as well, your Honor. I mean, these are -- Congress I think has spoken to this issue by giving that very, very broad discretion.

THE COURT: What about the Charming Betsy canon and how that applies here?

MR. STEWART: Sure, your Honor. I think the best way to think about it is that as we've explained and as -- in the cases we've cited Cazun, Mejia, the continued availability of withholding of removal and Convention against Torture protection, these are the forms of protection -- of mandatory protection that fulfill our obligations under international law to the extent we've embodied them. We're not penalizing anybody through this particular sort of a bar on asylum eligibility. Asylum eligibility is not what's required by international law, it's a discretionary benefit that can be denied consistent with any international law obligations.

THE COURT: But I thought that the reason that the language that we've been discussing appeared in 1158 was

that Congress was intending to implement Article 31 of the 1967 protocol, right? It wasn't simply there of -- to say we just want to make sure that everyone understands that an application is an application and the applications are broad. It was intended to implement an international agreement, to which the United States was a party, that was intended to provide access to asylum to those who come into the country even if they don't come in in a legal manner.

MR. STEWART: Apologies, your Honor. I just wanted to make sure I have the right citation for you.

THE COURT: Okay, thank you.

MR. STEWART: Your Honor, I think that the Supreme Court in INS v. Cardoza-Fonseca emphasized that it's withholding of removal that addresses the mandatory part of the protocol obligation. That's at pages 440 to 41 of that decision. The Supreme Court also explained at page 429 that the protocol doesn't require the granting of asylum to anyone. It was before the protocol came into place, withholding of removal could be -- was not mandatory. It was making that obligation mandatory that meets the international law obligation. Asylum corresponds -- as I think some of the other recent decisions from the Third and Fourth Circuits, your Honor, that we've cited, asylum corresponds to a precatory, non-mandatory provision of the protocol. I believe it's section --

THE COURT: But I suppose the question, though, is what Congress thought when they passed this language. If Congress thought they were doing this to implement the protocol, then that informs what Congress meant in doing so, right. And if the protocol says you cannot penalize anybody in the asylum process based on how they entered the United States, then that would seem to suggest that that's what Congress intended to preclude here.

MR. STEWART: Again, I don't think that's what Congress said, because it didn't make asylum mandatory, your Honor.

THE COURT: Right, of course.

MR. STEWART: And I'd also just push back on the penalties proportion. I think Cazun and Mejia, those decisions from Third and Fourth Circuits emphasize that it's not a penalty. There's nothing criminal about this ruling here or there's not a fine. It's just you're not eligible for the wholly discretionary benefit of asylum.

THE COURT: Do you think the Court should give any deference to the views of the UN High Commissioner for Refugees with respect to the meaning of the protocol?

MR. STEWART: No, they're wrong. What they're saying --

THE COURT: They may be wrong, but do I give them any deference before concluding they're wrong?

MR. STEWART: No, they're arguing -- no, your Honor. They're arguing in the teeth of INS v. Cardoza-Fonseca other decisions holding that asylum is not part of the mandatory obligations of the Supreme Court. They're simply -- they don't warrant deference or any kind of meaningful guidance or respect on that here.

If I could hit a -- I'm happy to generally rest on the briefs as to the section 1225(b)(1)(B) and the TVPRA arguments, your Honor.

THE COURT: Okay, I think the other side --

MR. STEWART: I think --

THE COURT: -- has done the same.

MR. STEWART: Yeah, I think those largely reduce to whether the rule is valid or not and for other reasons. As we've said, there's nothing wrong with Congress denying a credible fear determination when somebody has no basis to establish eligibility for asylum. We explained that on the --

THE COURT: Although that does sort of make the point, though, with respect to the very slim, if any, distinction between your ability to apply and eligibility. Because as you just described it, it's essentially you can't apply because you're not going to get it anyway.

MR. STEWART: Well, that's sort of the front door method for assessing an asylum application. Again, your

Honor, I'd hit the points that I've hit so far and --

THE COURT: Okay.

MR. STEWART: -- that are somewhat hit in our briefing.

THE COURT: Fair enough.

MR. STEWART: TVPRA, I would just mention that those are procedural protections, those are not changed here. It's substantive eligibility for asylum.

THE COURT: Okay.

MR. STEWART: If I can hit some of the points on good cause and foreign affairs, your Honor?

THE COURT: Yes.

MR. STEWART: I think when you were speaking with my friend on the good cause and foreign affairs exceptions, you hit some of these themes, your Honor. On good cause, I think the central point -- we discussed this. The rule was very concerned, and reasonably so, that if we announced this rule, there would be a surge of exactly the kind of problem we're trying to prevent, unlawful entries with people who have no valid asylum claims who would try to beat clock and avoid this entry bar. That was a very reasonable predictive judgment. It was one that the agency heads were well positioned to make. It falls squarely within the teaching that the mere announcement of a rule would precipitate adverse conduct by the parties affected.

We don't need -- we're not saying that every single person would have heard about this, and that people were monitoring the Federal Register. But word gets around. There are many NGO type legal services groups that do speak with people not just in the country but out of the country. I think the East Bay case has reflected that in some of the declarations for example. So people do hear about this. People can understand quite easily the way their own incentives -- asylum is a big deal, and people can say as your Honor said gosh, I better rush so I'm not ineligible for asylum, because that sounds like a great collection of benefits. That was perfectly logical and perfectly reasonable as a reason to publish immediately with --

THE COURT: So let me ask you, the comment period closes on January 8th, correct? I'm reading out of the Federal Register, so I think --

MR. STEWART: Right, I believe that's --

THE COURT: On January 8th. Do you have any idea when the Attorney General and Secretary of Homeland Security intend to issue a final rule?

MR. STEWART: I'm not sure, your Honor. I think as your Honor knows, that could depend on just the volume of comments. Sometimes we get a great many comments, sometimes fewer. There is -- there could be a good number of comments here that could be there. So I'm just not sure of the

timetable on that is the short answer.

THE COURT: One of the questions I have is how that implicates the question of whether Acting Attorney General Whitaker is properly serving or not. Because after January 8th, you need sort of to know who the Attorney General is to know whether the rule should be finalized in its present form or withdrawn or whatever.

And I understand the point that you've made in your papers is that Attorney General Sessions finalized -- essentially did everything that the Attorney General needed to do. The rule had to be published in the Federal Register, but there was nothing left for the Attorney General to do at that point in time. But there is going to be something for the Attorney General to do again after January 8th.

So how does that affect the question of whether this case appropriately raises the issue of the Acting Attorney General status?

MR. STEWART: I think it -- I'm reluctant to speculate, your Honor. And I think the way it affects it is that it would be -- given on the firsthand just the factual error underlying that claim at this point, and just the uncertainty as to where things will be January 8th as to whether there will be a Senate confirmed Attorney General. I don't think it will --

THE COURT: My recollection or understanding is I don't think that Mr. Barr has been nominated yet. And I don't know when Congress comes back, but it seems unlikely that there will be a confirmed Attorney General by January 8th.

MR. STEWART: I guess I haven't thought through that argument because it just hasn't -- it has not been raised, your Honor. And I do want to be careful not to step on that. I am aware that your Honor had a lengthy argument --

THE COURT: Yes.

MR. STEWART: -- on Friday on many of these issues.

THE COURT: I'm sure you got a debriefing on that.

MR. STEWART: I'm happy to leave the bulk of those points with my colleague on Friday. I would say that given the factual point, there's certainly not a strong enough case for relief on that ground here.

If I can hit the foreign affairs exception, your Honor?

THE COURT: Yes.

MR. STEWART: I think the key thing to emphasize here is that this is not -- the rule is not claiming oh, just because this involves immigration, we should get exception from notice and comment materials. It's about

like look, we have a serious international problem where a large number of aliens are transiting Mexico. Mexico is not doing its part to offer asylum to otherwise deal with the situation. The northern triangle countries are having apparent issues similarly with their own nationals.

And we need a way to solve this continuing situation that's creating a crisis for our asylum system that's allowing it to be overrun by meritless claims, delay claims of people who do have meritorious claims. And one big way to do that is to immediately put a rule in place that does put pressure on our international partners and says, look, you're not going to be able to just let people go through your country like a sieve and come here and you're not going to be able to take responsibility or do anything about it.

Like people are going to be -- they're going to have to take an orderly process, go to ports of entry, wait their turn and check all those boxes. That's the kind of thing that puts pressure on Mexico and aids negotiations, because it's something that forces Mexico to realize oh, this is a problem. And if we're taken to account to deal with it, we actually need to do something about that.

I'd add also on the foreign affairs exception, your Honor, I'd fault both the district court opinion and Judge Bybee's opinion for I think too much second guessing

the foreign affairs judgments. One of the points -- and this is something that I think the Chief Justice hit upon in I believe it was page 2415 of his Trump versus Hawaii opinion about situations where judges are just not well positioned to assess different international risks.

I think is one of those cases, especially with negotiations, your Honor. The United States can't be expected to show its hand on negotiating strategy that would severely imperil its ability to negotiate. It's very hard also for people not involved in the negotiations to be able to tell how they're going to go. I mean, suppose you see a news report that somebody has walked away from the negotiating table.

You wouldn't know what to make of that. It could mean the negotiation is going horribly or it could mean the negotiation is going fine. It's very common for negotiations to end up just fine after somebody's walked away from the negotiating table. It's a common tactic.

So the Court is just respectfully not well position to second guess those predictive judgments similarly to the way that the Court is not well positioned to second guess the good cause judgments.

I think maybe I'll hit briefly on the arbitrary and capricious aspects, your Honor. And I can maybe also address remedy if you'd wish.

THE COURT: You're welcome to do so, yeah. I mean, I'd like to make sure we're reserving a little bit of time just to talk about where we go from here.

MR. STEWART: Yes, your Honor. I'll be expeditious on these points. I think the arbitrary and capricious arguments brought by the S.M.S.R. plaintiffs, they really rest on a second guessing of the Executive Branch's determinations here. The rule here is a reasonable effort to help aid the President's foreign policy agenda, help deal with this problem that's overloading our asylum system with low merit claims. It's a rational -- there's a rational connection between those things. The agencies made fair predictive judgments as to how it would make things more orderly.

THE COURT: Right, I get that point. But I guess the question that I'm struggling with is how can I conclude that this is one of those cases where the Attorney General didn't actually make all those determinations but simply said whatever the President says in the future with respect to the southern border, that's going to be a basis to categorically deny eligibility for asylum.

And so it's not -- there's not in the rule -- the Attorney General didn't sort of wrestle with these issues, but rather deferred to the President to do so. And under the APA, I need to kind of consider what the Attorney

General and the Secretary of Homeland Security's considerations were.

MR. STEWART: Yes, your Honor. I think two points in response to that. It's not a fair characterization here to call this -- and your Honor didn't use these terms, but a blank check where there's been a transfer of asylum ineligibility. The rule itself is what imposes the asylum ineligibility.

What it uses, though, as a hook for that, as a triggering mechanism is a particular kind of presidential determination. That's not sort of a hey, whatever the President determines about any foreign affairs matter, that's going to be the bar for asylum; or whatever the President determines about non foreign affairs matters. It's a specific kind of presidential determination. It's a national interest determination that causes the President to reach the very consequential and important conclusion that a suspension or limitation on entry is needed. So it's tethered to a very particular --

THE COURT: Right, but just to take one example though. One could imagine a question arising as to whether adopting a rule like this for a period of 90 days makes any sense whatsoever in saying that people who during this 90-day window enter across the border should not be -- should be ineligible for asylum.

And you can imagine an Attorney General saying that's a crazy rule, because what it's going to do is it's just going to create this incentive at the end of the 90 days for everyone then to rush across. And we're going to be even more burdened then, it's going to be a big mess. I don't know what the considerations are, but all I know is that the Attorney General could not have made those considerations, because at the time that he issued the rule the President had not yet issued the proclamation.

And so the Attorney General never went through the process of actually considering the rationality of the particular ban on eligibility for asylum that he adopted through his discretion, because it was based on something the President hadn't done yet.

MR. STEWART: Respectfully, your Honor, I think the Attorney General and Secretary, they did make that kind of determination here when they said we link this to a specific 212(f) proclamation. It doesn't -- they didn't say -- the 212(f) proclamation -- I mean, they applied some limitations by saying, look, if you have a valid 212(f) proclamation, it's going to be the kind of thing that categorically should trigger ineligibility for asylum. They recognized that there could be other proclamations that work in different ways, but the rule reflects a determination that a valid 212(f) proclamation will appropriately trigger

asylum ineligibility.

THE COURT: So if the President instead had said, "I've concluded that we just have to shut down the Mexican border entirely, no one can come in through a port of entry or otherwise. It's just shut down"; that you would say under those circumstances that the Attorney General had also concluded that that was a rational and reasonable exercise of his discretion with respect to eligibility for asylum under those circumstances?

MR. STEWART: Well, your Honor --

THE COURT: Or if the President had said, "We're going to shut down the ports of entry, but we're going to actually leave the illegal borders open. And people can come in illegally into the country if they want to, but they can't come in through one of the entries." The Attorney General says, "Well, I think that's a rational thing to do, that makes sense to me."

MR. STEWART: Well, I think the Attorney General was aware, your Honor, that the section 212(f) authority is very broad. It is broad. It allows the President to do a lot of different things. It does hinge -- and I think this is important -- on the President's finding that a particular suspension is needed in the national interest or is in the national interest.

So I think that determination that this is a

particular kind of finding --

THE COURT: I have to say, I don't find that hugely convincing. Because as I've said a number of times now -- and I don't want to keep repeating myself, but it's already illegal to come in the border in the ways that are at issue here. Congress and the President through signing the INA have already made that illegal.

And so all the President has really done is -- you know, there may be some tertiary stuff with directions to study this or that. But all the President has really done here is issued a proclamation for purposes of implementing the regulation. And that sure feels like it's -- it's not saying in circumstances in which something is of such profound significance, that the President has had to do X, Y or Z.

If there's a declaration of war -- I could imagine a world in which you could say that the Attorney General might say, "You know what, I'm going to adopt" -- "I'm going to exercise my authority under the INA to say we're not going to grant asylum to anyone who enters the United States illegally who is a citizen of a country in which we are at a declared state of war." Because, you know, just the significance of being in a state of war, whatever it might be.

But here, all -- I mean, what the President did

was purely linked to the regulation. He was simply saying -- I mean, he might have just as well sent a memorandum directed to the Attorney General and the Secretary of Homeland Security saying, "I care deeply about this, and I want you to adopt a regulation that addresses this problem because I care so deeply about it." And then they would have actually made the decisions, and you would have said, "We did this in part because the President cares so strongly about this."

MR. STEWART: I think it was -- your Honor, the President here exercised square broad statutory authority, and did it in an open, transparent --

THE COURT: Right.

MR. STEWART: -- politically accountable way. That's an important matter, especially when -- on an area where the President has broad authority. The President -- he may have broad authority, but he does it out in the open and --

THE COURT: But he doesn't have authority -- I mean, this might be the problem. He has authority with respect to who comes across the border and what the rules are with respect to coming across the border. He doesn't have authority with respect to who gets asylum. Yet what he did was issue a proclamation in which the only meaningful function of that is to make a determination with respect to

who's eligible for asylum, because it already is illegal to cross the border. It doesn't do anything.

MR. STEWART: And on that, your Honor, I would fall back on what the agency heads together jointly determined themselves. This kind of a contravention, you know, contravening this sort of a presidential determination is significant, it's different in kind and it's the kind of thing that categorically warrants ineligibility for asylum.

So I'd rest on that.

THE COURT: Okay.

MR. STEWART: If I can hit briefly the remedies points, your Honor -- and I'm happy to rest on my briefs on most of these points. --

THE COURT: I know remedies are an important issue here.

MR. STEWART: Very good. So I'd emphasize that at the 1252(e)(3) stage, we're still premature on that. That remedy scheme is highly limited as to what's allowed in the wake of injunctions, class actions and the like.

For the many in removal proceedings, there's no real need for imminent relief. And the point that I'd amplify is there's really no purpose -- or there's really no basis for a nationwide injunction here, your Honor. In one case we have six individual plaintiffs. All but one as we've said are in section 240 proceedings. The other two

individual plaintiffs in the other case, section 240 proceedings. No class has been certified. There's already another injunction in place. There's no irreparable harm.

There's really no need or warrant for the Court to do any injunction. To the extent the Court were to order some kind of status quo or injunction relief, it should be the sort of thing that would at the most address the particular -- stay things for individual plaintiffs or bona fide clients of these organizations. But there's no basis for broader relief than that. And that relief for the many reasons we've said, jurisdictional and otherwise, is not warranted.

THE COURT: All right, thank you.

MR. STEWART: Thank you, your Honor.

THE COURT: All right. How about -- well, how many minutes do you need for reply?

MS. REYES: I need less than three.

THE COURT: Okay, perfect, and then we can turn to -- I'll give you three as well.

MR. REICH: I'd like three as well.

THE COURT: And then we can turn to next steps.

MS. REYES: Okay, I may talk quickly now. First, your Honor, the Government cited 1158(b)(2)(C) twice for the Attorney General's discretion. He omitted the key language from that section which was, quote, consistent with the

section that requires the Attorney General's actions to be consistent with of course 1158(a)(1), and they're not.

With respect to 212(f), Trump versus Hawaii was quite clear that that power is also not limitless. It cannot be used to violate an expressed provision of the INA. And the proclamation in that case, which I think everyone can agree was at least controversial, by the time it made the Supreme Court exempted those seeking asylum and those who had asylum. So the Supreme Court wasn't even taking up that issue in that case.

Finally, with respect to the treaty obligations, the Government said that the treaty says that -- that courts have said that withholding of removal is sufficient to satisfy the treaty. That's the wrong question. That's with respect to our non-refoulement obligations. But this is not what we're relying on here. We're relying on Article 31(1) which is the non-penalty provision. And there is of course a penalty if you can't get asylum but you can only get withholding of removal. Because as the Government concedes, there are things you can get in asylum that you can't get in removal. And two of those things are things that are required by the treaty: The ability to travel freely, and a path to naturalization. So not only are there things under U.S. law that you can't get if you don't get asylum, there are things the treaty requires that you're entitled to

receive as an asylee.

Finally with respect to the numbers, your Honor, I would just point out that the Government concedes that in 2017, 6,000 people who came through the southern border through the credible fear interview process received asylum. When they went through the entire process, those are 6,000 people that the courts determined would be persecuted if they were returned. This rule would prohibit those people from obtaining asylum. And if they were not able to meet the higher standard showing at a credible fear interview, would not even be able to apply for asylum. So the application eligibility distinction falls apart for those individuals. And those individuals would have been returned without having the right to have obtained the asylum which courts have determined they were entitled to.

And finally, your Honor, I would just say that in response to your question as to how you're struggling to figure out how Judges Tigar and Bybee are not correct, I would just urge you to stop struggling. They are correct. Their reasoning was correct. And we will rest on those arguments.

THE COURT: Okay, thank you.

MR. REICH: And just three additional points from me, your Honor. First, I think your discussion hit on the critical point with respect to the proclamation vis-a-vis

the reg which is that the proclamation here serves no function other than imposing the conditions and limitations on asylum that the Attorney General did not select himself. And indeed, it's leveraging a separate power that is solely about restricting entry which really has no application here because entry is already restricted.

And I actually thought it was telling that my friend talked about in both the travel ban litigation he said, well, these orders change over time, and who knows, in 90 days there might be a different one. And I think that's part of the problem here is that in 90 days, this rule may incorporate an entirely new set of restrictions that the Attorney General has never had a chance to pass on or that's never been subject to APA review.

With respect to the foreign affairs exception, my friend discussed this purported rationale that the rule would put pressure on Mexico, and that that was the reason. I reread the rule's justification and the briefs. That's the first time I've ever seen that as a justification, that this rule will sort of pressure Mexico to adopt an agreement because there's too many people waiting inside the country. That's just not in the rule. The rule just says this relates to the negotiations, and it implicates our relationship with Mexico. And I think this is kind of a novel --

THE COURT: Although you can understand why the Government might be reluctant to put too much in the rule, because it could undermine the negotiations with Mexico.

MR. REICH: Well, yes, although it's saying it in open court now so I'm not sure that it's a secret.

THE COURT: Well, they haven't asked me to seal the courtroom yet.

MR. REICH: And not only is that new, I don't think it was ever mentioned at any point in the East Bay litigation. Judge Bybee said, "Maybe the Government has some reason for this, but they have yet to tell it to me." And I think there's no question the justification needs to be findings in the rule itself. This is the agency's burden.

And with respect to good cause, I just think it's -- everything the Government said to you is pure speculation about the incentives these aliens would face and the likelihood they would do this. And I just think the critical point here is that any rule, the Government can say, look, EPA is going to impose new smokestack regulations, and it's going to take effect in 90 days. There's a risk someone's going to put in new dirty smokestacks and try to grandfather them in. Or the SEC has new anti-fraud rules, and people will get in their fraud before the rules go into effect. And there needs to be more

than that.

And the Mobil Oil case, which is really the only one that in any way invokes this rationale, was one -- well, what the agency was trying to do was there was a loophole in the law that they noticed. And the agency said we don't want to tell anyone about the loophole and give them notice of it, because then they'll take advantage of it. And there was actually evidence that people already started to do that. There's no precedent like this where an agency says we just need to keep -- we just need to avoid the incentives of a violation in the interim. And if that was ever a rationale, it would need to be supported by at least a modicum of evidence, not just purely throwing up the agencies' hands as they did here.

THE COURT: All right, thanks.

MR. REICH: Thank you.

THE COURT: So the question I now have is next steps. What I was thinking about -- and I guess I'd like your thoughts on this, is perhaps what we ought to do is reconvene later this week to talk about what to do when we have the benefit of Judge Tigar's decision, if he renders one on Wednesday. We'll at least know what's happened with the TRO in the East Bay litigation. And we may have a decision one way or the other from the Supreme Court.

There may be others in the room that may have more

insight into the Supreme Court and how likely -- how quickly we can expect a decision on that. But I think maybe we should schedule something later today -- later this week. And what I would ask the parties to do in the interim is to meet and confer with respect to a schedule going forward on the assumption that there is a nationwide injunction that remains in place later this week.

My at least tentative thinking is the sensible way to proceed would be through expedited briefing on cross-motions for summary judgment. The O.A. plaintiffs I know have indicated that they want to amend, and I think we ought to -- I don't know if they're in a position to do that immediately. But if not, they ought -- I'm getting head shakes. So I think you should do that, and I think you're entitled to as of right at this point because there has not been an answer or a motion for summary judgment yet. So I think you're entitled to amend as of right. Get that on file which may help in the discussions then about how we should proceed.

And then in discussing -- assuming that there's a nationwide injunction that remains in place and that the right way to proceed is by expedited cross-motions, I think also you should consider in that briefing with respect to the appropriateness of class consideration, and whether there is a class and whether I can preliminarily certify a

class or how we would proceed with respect to the class allegations in the case.

If for some reason between now and whenever we come back there is a gap and there's an order that comes down, for example, from the Supreme Court granting a stay in a way that doesn't resolve the matter for me, then what I would ask the parties do is that they jointly contact the courtroom deputy and just schedule a time to come in quickly and to confer with me about how we ought to proceed in light of that gap.

Ms. Reyes?

MS. REYES: Cognisant that lawyers work late, your Honor, if the gap were to happen after-hours, could we either get a representation from the Government that nothing would happen until we at least got before you the next morning or to the courtroom deputy or -- and I hate to ask, is there an emergency number that we can contact?

THE COURT: Let me ask the Government first with respect to that. I'm not sure you're in a position in which you can fully address that.

MR. STEWART: I propose that we confer on that, your Honor, and try to find --

THE COURT: Okay, so why don't you confer on that. But the answer to your -- and hopefully we wouldn't have to do that. But the answer to your question is I believe that

through the Marshals Service, if there were a true emergency I could be reached. I also tend to work pretty long hours, and so if you couldn't reach the courtroom deputy and it were after-hours -- I don't know, is the courtroom number posted on our website? If not, we can provide everyone with that telephone number so you can contact chambers if you need to.

So if you need to get in touch with me and you need me, I'm around and available essentially at any hour.

MS. REYES: Thank you, your Honor.

THE COURT: Okay, thank you.

Yes?

MR. REICH: Your Honor, I just wanted to -- the S.R.S.M. [sic] plaintiffs will also intend to amend their complaint. We have some additional plaintiffs to add and maybe some other amendments.

THE COURT: Can you also do that immediately?

MR. REICH: Yes, we'll do that.

THE COURT: And by immediately, I suppose it probably is helpful to actually -- what about the end of the day tomorrow for both of you, is that sufficient?

MR. REICH: Yes, for us.

THE COURT: Okay. So I'll specify that any amendments will be made by the end of the day tomorrow.

Anything further that I should take up today? All

right, well, I'll let you have lunch.

And let me just before I go compliment all of you. I mean, the case was exceedingly well briefed, and the arguments were exceptionally good all around by everybody. So thank you.

(Proceedings adjourned at 1:02 p.m.)

C E R T I F I C A T E

I, **Jeff M. Hook, CSR, RPR,** certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

December 19, 2018

DATE

Jeff M. Hook, CSR, RPR

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	Civil Action No. 1:18-cv-02718-RDM

DECLARATION OF HARDY VIEUX

I, Hardy Vieux, declare as follows:

1. My name is Hardy Vieux, and I am the legal director at Human Rights First. I submit this declaration in support of Plaintiffs' motion for class certification.

2. Human Rights First is an independent nonprofit organization with its headquarters in New York and Washington D.C. Human Rights First represents refugees and asylum seekers *pro bono* either in-house or through mentorship of pro bono attorneys. Human Rights First has decades of experience in this arena and a strong commitment to ensuring that the right to seek asylum is available to all noncitizens who are fleeing persecution on account of their membership in a protected group.

3. Human Rights First handles cases before United States Citizenship & Immigration Services and the Board of Immigration Appeals, and in immigration and federal courts. Human Rights First currently represents over 1,000 asylum seekers nationally. In addition to this experience, Human Rights First has a long history of advocating for the rights of asylum seekers through federal, local, and state advocacy. More recently, Human Rights First has begun

using federal court litigation, where appropriate, to help advance and secure the rights of asylum seekers.

4. I am a 1997 graduate of the University of Michigan's Law School and Ford School of Public Policy. I have been licensed to practice law since 1999.

5. I have held my current position since 2014. In my current role, I lead and oversee the management of Human Rights First's legal initiatives, including its pro bono legal representation, amicus brief, impact litigation, and legal outreach efforts. In addition to this experience, I am currently among counsel representing a class of detained asylum seekers who may have been improperly denied release from immigration detention on parole.

6. Before assuming this role, I served as a policy fellow at Save the Children in Amman, Jordan, where I handled child protection policy issues impacting Syrian refugee children living in Jordan.

7. Prior to living in the Middle East, I spent more than ten years in a private legal practice focusing on while collar criminal defense and complex civil trials. I represented a wide array of institutional and individual clients—including major technology companies and manufacturers, real estate developers, and pharmaceutical companies. I also handled numerous pro bono matters, ranging from litigation surrounding the abuses at Abu Ghraib prison in Iraq to juvenile detention impact litigation and asylum representation.

8. Before entering private practice, I was a criminal appellate defense counsel in the United States Navy's Judge Advocate General's Corps from 1999 to 2002.

9. In addition to my own experiences, I am aware of the expertise that my colleagues, Eleni Rebecca Bakst and Anwen Hughes, bring to this matter.

10. Ms. Bakst is an Equal Justice Works fellow at Human Rights First. She graduated from Duke University School of Law in 2017 and joined Human Rights First shortly after. She has been licensed to practice law in the state of New York since 2018.

11. During her time at Human Rights First, she has conducted research and advocacy surrounding various barriers to seeking asylum in the United States. She has drafted several reports on issues ranging from immigration detention to difficulties asylum seekers face in crossing into the U.S. In addition to this experience, Ms. Bakst is currently among counsel representing a class of detained arriving asylum seekers who may have been improperly denied release from immigration detention on parole.

12. Ms. Hughes is the deputy legal director at Human Rights First. She is a 1998 graduate of Yale Law School and has been licensed to practice law since 1998. Ms. Hughes joined Human Rights First in 1999 and assumed the role of deputy legal director in 2014.

13. In that role, she helps oversee Human Rights First's pro bono representation program for asylum seekers. She also provides training and support to pro bono attorneys from area law firms who represent asylum seekers through our program.

14. Before assuming the role of deputy legal director, she worked in several other capacities at Human Rights First, including deputy director from 2008 to 2014, senior counsel from 2006 to 2014, staff attorney from 2001 to 2006, and a National Association for Public Interest Law (now known as Equal Justice Works) fellow from 1999 to 2001.

15. Throughout her career, Ms. Hughes has provided mentorship to pro bono attorneys in over 1,000 asylum cases and has directly represented hundreds of individuals in a variety of immigration matters. Prior to joining Human Rights First, Ms. Hughes worked at the

Passaic County Legal Aid Society, where she represented recipients of public benefits and coordinated legal services for the elderly.

16. Ms. Bakst, Ms. Hughes, other members of Human Rights First's litigation and asylum teams, and I have been involved in the investigation and preparation of this lawsuit including developing the facts and legal arguments, and the drafting of the complaint and briefing.

17. Human Rights First is committed to zealously representing the Plaintiffs and the class whom they seek to represent.

18. Human Rights First is representing Plaintiffs on a *pro bono* basis. Human Rights First is not being reimbursed for its representation of the individual plaintiffs or from other members of the proposed class, nor, to my knowledge is co-counsel.

I declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, memory, and belief.

Executed on the 3d of January 2019.

s/ Hardy Vieux

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EXHIBIT N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	Civil Action No. 1:18-cv-02718-RDM

DECLARATION OF CHARLES ROTH

I, Charles Roth, declare as follows:

1. My name is Charles Roth, and I am the Director of Litigation at the National Immigrant Justice Center (NIJC). I submit this declaration in support of Plaintiffs' motion for class certification.

2. The National Immigrant Justice Center is a program of Heartland Alliance, a nonprofit organization with its headquarters in Chicago, Illinois. NIJC represents immigrants, refugees, and asylum seekers *pro bono* or at low cost. NIJC has decades of experience in this arena and a strong commitment to ensuring that the right to seek asylum is available to all noncitizens who are fleeing persecution on account of their membership in a protected group.

3. NIJC handles cases before United States Citizenship & Immigration Services (USCIS), in immigration courts, before the Board of Immigration Appeals (BIA), and in federal courts. NIJC represents approximately 1,000 asylum seekers at any given moment. In addition to this experience, NIJC has a long history in federal court litigation, both in the context of class actions and on behalf of asylum seekers. It maintains one of the largest federal-court litigation dockets of any immigration nonprofit organization in the United States.

4. As indicated above, I am the Director of Litigation at NIJC. I am a graduate of Notre Dame Law School. I have been licensed to practice law since 1997, and I have held my current position since 2006. Before assuming this role, I worked at the organization now known as NIJC in a variety of different attorney positions, beginning in 2001. I have been recognized nationally as an expert in asylum litigation, and I frequently speak on that topic. I have argued or been counsel in dozens of published asylum matters. *See, e.g., Martinez Buendia v. Holder*, 616 F.3d 711 (7th Cir. 2010); *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc) (argued as amicus). I have also served as class counsel in numerous immigration class action matters. *See, e.g., Jimenez Moreno, et al., v. Napolitano*, 213 F. Supp. 3d 999 (N.D. Ill. 2016); *Garcia v. Johnson*, No. 14-CV-01775-YGR, 2014 WL 6657591 (N.D. Cal. Nov. 21, 2014); *Ramos v. Ashcroft*, 02-cv-08266 (N.D. Ill. June 10, 2005) (class settlement); *Kazarov v. Achim*, No. 02-cv-5097, 2003 WL 22956006 (N.D. Ill. Dec. 12, 2003).

5. In addition to my own experiences, I am aware of the expertise that my colleagues, Keren Zwick and Gianna Borotto bring to this matter.

6. Ms. Zwick is an Associate Director of Litigation at NIJC. She graduated from Columbia Law School in 2009, and then worked for the United States Court of Appeals for the Seventh Circuit. In 2011, Ms. Zwick joined NIJC. She has significant expertise in asylum related litigation, having represented more than thirty petitioners in circuit court appeals on asylum related matters. *See, e.g.*, *Cazun v. U.S. Att'y Gen.*, 856 F. 3d 249 (3d Cir. 2017) (asserting the right to seek asylum despite reinstatement of a prior removal order); *Garcia v. Sessions*, 873 F. 3d 553 (7th Cir. 2017) (same); *Velasquez Banegas v. Lynch*, 846 F. 3d 258 (7th Cir. 2017) (protection based claim by HIV positive Honduran); *Avendano-Hernandez v. Lynch*, 800 F. 3d 1072 (9th Cir. 2015) (protection based claim on behalf of transgender Mexican woman; Ms.

Zwick argued on behalf of *amici*). In addition to this appellate experience, Ms. Zwick is currently representing a putative class of noncitizens in a challenge to immigration enforcement practices in the Chicagoland area. *See Castanon Nava et al v. Department of Homeland Security et al.*, No. 18-cv-103757 (N.D. Ill. 2018).

7. Gianna Borroto is a Senior Litigation Attorney at NIJC and a 2011 graduate of Harvard Law School. She is licensed to practice law in the state of Illinois. Ms. Borroto has worked at NIJC since 2011, advocating for the rights of low-income immigrants, refugees, and asylum seekers. During her more than six years on NIJC's Immigrant Children's Protection Project, she developed a specialty for representing unaccompanied immigrant children seeking asylum. Ms. Borroto supervised NIJC's Immigrant Children's Protection Project and is well-versed in immigration law, particularly asylum law. In addition to this experience, Ms. Borroto is currently among class counsel for a class of former unaccompanied children improperly transferred from juvenile custody to ICE detention. *See Garcia Ramirez et al. v. U.S. Immigration and Customs Enforcement et al.,* No. 18-cv-00508-RC (D.D.C. 2018).

8. Ms. Zwick, Ms. Borroto, other members of NIJC's litigation and asylum teams, and I have been involved in the investigation and preparation of this lawsuit including developing the facts and legal arguments, and the drafting of the complaint and briefing.

9. NIJC is committed to zealously representing the Plaintiffs and the class whom they seek to represent.

10. NIJC is representing Plaintiffs on a *pro bono* basis. NIJC is not being reimbursed for its representation of the individual plaintiffs or from other members of the proposed class, nor, to my knowledge is co-counsel.

I declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, memory, and belief.

Executed on the 3rd of January, 2019, by Charles Roth.

s/ Charles Roth
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, on behalf of themselves and all others similarly situated *Plaintiffs*, v. DONALD J. TRUMP, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-2718-RDM [Consolidated with Civil Action No. 18-cv-2838-RDM]

[PROPOSED] ORDER

The Court has considered all authorities, evidence, and arguments presented by all parties concerning Plaintiffs' Motion for Summary Judgment and Class Certification, ECF No. __. The Court concludes that Plaintiffs have met the requirements of Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, and therefore certifies a class with the following definition:

> All noncitizen asylum-seekers who have entered or will enter the United States through the southern border but outside ports of entry after November 9, 2018.

Plaintiffs O.A., A.V., C.A., G.Z., D.S., and K.S. are hereby approved as named class representatives, and Plaintiffs' counsel, along with counsel of record for plaintiffs in the consolidated case *S.M.S.R. v. Trump et al.*, No. 18-cv-2838-RDM, are hereby appointed class counsel.

The Court additionally finds pursuant to Rule 56 of the Federal Rules of Civil Procedure that there is no genuine dispute as to any material fact and Plaintiffs are entitled to judgment as a matter of law, and therefore GRANTS Plaintiffs' Motion for Summary Judgment.

Dated: _____

_____
Hon. Randolph D. Moss, U.S. District Judge